90-222 (1)
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BEVERLY ANN COOK, CLAUD RICHARD DOTY, WENDELL L. SMITH, JR., and LINDA SMITH WEST,
Petitioners,

vs.

ARAMINTA MCCULLOUGH; C & N LEASING AND RENTAL CO., INC.; JIM ED CLARY, Property Assessor of the Metropolitan Government; BILL GARRETT, Trustee of Davidson County; and MULTIMEDIA, INC. d/b/a *The Nashville Record,*
Respondents.

On Petition for a Writ of Certiorari to the Tennessee Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Due Process Clause permits the prosecution of actions to sell realty for delinquent property taxes without actual or constructive service of process on owners whose ownership is of public record, when those owners have failed to comply with a Tennessee statute requiring them to register their names and addresses with the property tax assessor?

(2) Whether the Tennessee statutory procedure which does not require that property owners whose names and addresses are reasonably ascertainable be given actual notice, in addition to the publication of one tax sale auction notice, complies with the requirements of the Due Process Clause?

(3) Whether the Tennessee statutory procedure which permits notice of delinquent property tax auctions to be given by publication of one tax sale auction notice in a legal newspaper, having a paid circulation and actual distribution of less than 1000 in a metropolitan area of over 450,000, complies with the requirements of the Due Process Clause?

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PETITION FOR A WRIT OF CERTIORARI

Appellants Beverly Ann Cook, et al.,* petition for a writ of certiorari to the Tennessee Court of Appeals, Middle Section at Nashville, to review (1) a judgment of the Tennessee Court of Appeals (which became final when the Tennessee Supreme Court denied Appellants' Application for Permission to Appeal

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* A list of all parties to this proceeding appears in the caption of the case. There are no parent or subsidiary companies to be listed in accordance with Rule 29.1. Pursuant to Rule 29.4(c), service will be made upon the Attorney General and Reporter of Tennessee because 28 U.S.C. §2403(b) may be applicable.

on May 7, 1990), holding that the Due Process Clause does not require that actual notice of a delinquent property tax sale auction be given to property owners whose names and addresses are reasonably ascertainable, in addition to publication in a legal newspaper of limited actual circulation; and (2) a judgment of the said Tennessee Court of Appeals, filed in a prior appeal in this cause on October 18, 1983, holding that there was no necessity of actual or constructive service of process on, or notice to, property owners of a proceeding to sell their property for delinquent taxes, where the owners had failed to comply with a statute requiring them to register their names and addresses with the local property assessor.

OPINIONS BELOW

The judgment of the Court of Appeals filed December 29, 1989, which is not reported, appears in Appendix C, and the judgment of the Court of Appeals filed October 18, 1983, which is also not reported, appears in Appendix A. The Opinion of the Tennessee Supreme Court on a limited appeal from the October 18, 1983 judgment, which did not address directly the issues which are the subject of this Petition, is not reported and appears in Appendix B.

JURISDICTION

After the October 18, 1983 judgment of the Tennessee Court of Appeals, Middle Section at Nashville, this cause was remanded, by an Opinion of the Tennessee Supreme Court, filed November 19, 1984, to the trial court for trial of the issue whether the publication of the tax sale auction notices (the notices given after the decree of sale has been entered) complied with statutory and due process requirements. The case was tried on February 22, 1988 (after an intervening interlocutory, extraordinary appeal[1] addressing the scope of the Supreme

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[1] Reported as *Cook v. McCullough*, 735 S.W. 2d 464 (Tenn. App. 1987, permission to appeal denied 1987).

Court's remand), and the trial court decision was subsequently appealed to the Tennessee Court of Appeals, Middle Section at Nashville, which rendered an Opinion on December 29, 1989. Appellants filed a timely Application for Permission to Appeal with the Tennessee Supreme Court, which denied that Application on May 7, 1990.

This Petition is being docketed within 90 days of the denial of Appellants' Application for Permission to Appeal by the Tennessee Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES

The pertinent provisions of the Fourteenth Amendment to the United States Constitution and of the Tennessee Code Annotated (in effect at the time when the delinquent property tax actions were conducted) are set forth in the Appendix K at A-68 - 70.

STATEMENT

This action is a consolidation of two suits instituted by Appellants to set aside 1979 sales of properties for delinquent ad valorem taxes. Appellants Wendell L. Smith, Jr., Beverly Ann Cook, and Linda Smith West are residents of Davidson County, Tennessee. Appellant Claud Doty is a resident of Cheraw, South Carolina. They were some of the owners of the subject properties at the time the delinquent property tax actions were instituted and the tax sales were conducted. They are now devisees and heirs of the remaining property owners. Finding of Fact 1, App. H, at A-40.

Appellee C & N Leasing & Rental Company, Inc. ("C & N") is a Tennessee corporation with its principal office in Nashville, Tennessee and is the purchaser of one of the subject properties. Appellee Araminta McCullough ("McCullough") is a resident of Davidson County, Tennessee, and is the surviving spouse of William C. McCullough, deceased, who purchased the other

property with his spouse, as tenants by the entirety. Finding of Fact 2, App. H, at A-40.

Appellee Jim Ed Clary is the duly elected and acting Property Assessor of the Metropolitan Government of Nashville and Davidson County, Tennessee. Appellee Bill Garrett is the duly elected and acting Trustee of the Metropolitan Government. Multimedia, Inc. which intervened after the first appeal is the owner and publisher of *The Nashville Record*. Finding of Fact 3, App. H, at A-40.

John S. Edney died on March 14, 1969, leaving a Will which was admitted to probate by the Probate Court of Davidson County, Tennessee, on March 25, 1969 and was recorded in Will Book 93, page 304. At the date of his death, John S. Edney owned two Davidson County tracts of land comprising Metropolitan Tax Map Parcel Nos. 68-8 and 68-45 (the "Properties"), said properties being parts of the properties conveyed to John S. Edney by duly recorded deeds. The Complaints allege that Parcel 68-8 is a part of a tract containing 30 acres and that Parcel 68-45 is a part of a tract containing 44 acres. Finding of Fact 4, App. H, at A-40 - 41.

In his Will, John S. Edney devised "(a)ll of the rest, residue and remainder of my estate, whether real, personal or mixed, in equal shares to my four sisters as follows: Mrs. Claude Doty, Miss Lillian Edney, Miss Leona Edney, and Mrs. Wendell Smith, Sr., share and share alike." Finding of Fact 5, App. H, at A-41.

Lillian Edney died intestate on March 18, 1970, and her property passed to her heirs at law. Leona Edney died on September 2, 1976, and her Will, which was admitted to probate by the Probate Court of Davidson County on August 17, 1977 and recorded in Will Book 121, page 173, devised her interest in the Properties to

> my four nieces and nephews per stirpes share and share alike. My four nieces and nephews are Beverly Ann Cook,

> Linda Dellwen West, Wendell Lee Smith, Jr., all of Nashville, Tennessee, and children of my sister Jessylea Smith; and Claude Richard Doty of Morristown, Tennessee, son of my sister, Carrie Edney Doty.

Mrs. Wendell L. Smith, Sr., died intestate on November 7, 1978 (after the suit to sell the Properties was filed) and letters of administration were issued to Wendell L. Smith, Jr., Linda Smith West, and Beverly Smith Cook as co-administrators of the estate of Jessylea Edney Smith. Mrs. Carrie Edney Doty, a resident of South Carolina, died after the property was sold. Her Will, which was probated in South Carolina, was filed for ancillary probate on July 30, 1980, and recorded in Will Book 131, page 210 in Davidson County, Tennessee, devised all her property to Appellant Claud Richard Doty, Jr. Findings of Fact 6, 7, 8, and 9, App. H, at A-41 - 42.

In addition, Appellants allege in their Complaint that the heirs of Miss Lillian Edney were her three sisters who were named in the Will of John S. Edney, namely, Mrs. Claude Doty, Miss Leona Edney, and Mrs. Wendell Smith, Sr. The Complaint further alleged that the heirs of Jessylea Edney Smith (Mrs. Wendell L. Smith, Sr.) were her children, Appellants Wendell L. Smith, Jr., Beverly Ann Cook, and Linda Smith West. (Record in Appeal 84-27-I, pages 1-5, 22-26)

Taxes for the years 1971 through 1976 were not paid. Suit was filed on March 13, 1978, styled *State of Tennessee, etc. vs. Delinquent Taxpayers for 1976 Taxes,* docket number 78-369-I, and John S. Edney was named as defendant in that action. At the time the suit was filed, and at all times relevant herein, the records of the Tax Assessor's Office reflected that the owner of the property was John S. Edney. Neither Appellants nor their predecessors in title advised the Tax Assessor's Office of their interest in the property. Appellants and their predecessors in title did not register their names and addresses with the Tax

Assessor's Office as required by a 1976 amendment to T.C.A. § 67-2018.[2] Finding of Fact 10, App. H, at A-42.

A summons was issued for John S. Edney which was returned by the Sheriff "Not to be found in my county" on April 28, 1978. Thereafter, an order of publication was entered on August 23, 1978, which order directed that publication be issued for John S. Edney. Finding of Fact 11, App. H, at A-43.

The publication was published in *The Nashville Record* for four consecutive weeks beginning September 7, 1978. No answer was filed and a default judgment was entered. An order of sale was entered and notices of the sale were published in *The Nashville Record* on December 28, 1978. Finding of Fact 12, App. at A-43.

Neither Appellants nor their co-owners or predecessors in title (with the exception of John S. Edney) were listed as delinquent on taxes or were made parties to the delinquent property tax suit. No service of process was issued and no publication was made for Appellants or their predecessors in title, other than that directed to John S. Edney. Finding of Fact 17, App. H, at A-44.

No notice of the tax auction sale of each Property, other than the single *Nashville Record* tax sale auction notice published on December 28, 1978, was given in any manner. The tax sale auction notices listed J. S. Edney, *et ux.* as the property owner and described the property to be sold as:

> Land in Davidson County, Tennessee
> Hydes Ferry Pike
> 24.2 Acres
> Field Book No. 13D 46030
> Map and Parcel No. 68-8

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[2] T.C.A. § 67-2018 has been recodified as T.C.A. § 67-5-2502 and has been substantially revised since this action was filed. The section in the pertinent form is in Appendix K at A-70.

or:

> Land in Davidson County, Tennessee
> Hydes Ferry Pike
> 29.38 Acres
> Field Book No. 13D 3470-13D 46700
> Map and Parcel No. 68-45

Findings of Fact 12 and 17, App. H, at A-43 - 44; Record in Appeal 89-245-II, Trial Court Papers, pp. 32-35.

The Properties were sold on January 25, 1979, with Parcel 68-8 being sold to William C. McCullough and wife, Araminta McCullough, for $3,790.00 and Parcel 68-45 being sold to Appellee C & N for the sum of $4,100.00. Thereafter the sale was confirmed by the Chancery Court and the Clerk and Master of the Chancery Court executed his deeds to the purchasers. Finding of Fact 13, App. H, at A-43.

The Nashville Record was first published on January 31, 1936. The initial front page of the paper contains a statement of the paper's policy and purpose, the pertinent parts of which are as follows:

> Our purpose is to render a constructive service entirely to the legal profession and the business life of NASHVILLE. . .
>
> * * *
>
> This paper fills a need of lawyers of Davidson County. By keeping THE NASHVILLE RECORD on file at all times they have a simple and convenient ways of keeping posted on all the court proceedings—a saving in valuable time. We publish a full bar docket, outlining the cases to come up in all courts, the new cases filed and judgments rendered; motions; divorce petitions and final decrees. We hope to make it as much a part of his office equipment as his law books and furniture.

> For the busy businessman we record in every issue general news; a complete record of mortgages, foreclosures, warranty deeds, conditional sales, extension agreements, chattel mortgages, releases, etc.; probate of wills, administrators, etc.
>
> In its columns you will also find bankruptcy petitions, removals, building permits, new car sales, marriage licenses, births, deaths, bank clearings, and when possible, a list of new residents.
>
> Every attorney, credit man, auto dealer, insurance agent, merchant, and other business men can readily see why they cannot be without THE NASHVILLE RECORD on their desks every day. . .
>
> (Record in Appeal 89-245-II, Transcript, Volume I, pages 27-30 and Plaintiffs' Trial Exhibit 5)

The December 28, 1978, issue of *The Nashville Record* (in which the relevant tax sale notices were published), at the top of page one, describes itself as "Nashville's Business, Financial, and Legal Newspaper since 1936." (Record in Appeal 89-245-II, Transcript, Volume I, pages 32-33 and Appellants' Trial Exhibit 8).

The December 28, 1978, issue of *The Nashville Record* contained approximately three to four pages of news and twenty-four pages of legal notices and court information. The tax sale, foreclosure sale, and other notices are interspersed throughout the paper as space permits, are not indexed in any manner, and any particular notice can be found only by perusing the entire paper. (Record in Appeal 89-245-II, Transcript, Volume I, pages 77-79 and Appellants' Trial Exhibit 8).

During the annual period ending on September 30, 1979, the total average paid weekly circulation of *The Nashville Record* was 937 copies with 757 copies being sold by paid annual subscriptions. The total average weekly distribution, which in-

cluded free distribution in addition to paid circulation, was 977 copies.[3] Between 1968 and 1983, the average weekly paid circulation fluctuated between a low of 882 in 1975, and a high of 1,243 in 1980, with most years being in the 1,000 or 1,100 range. The total distribution, including free copies, during that period ranged from 917 in 1975 to 1,273 in 1980. (Record in Appeal 89-245-II, Transcript, Volume I, pages 34-41 and Appellants' Trial Exhibits 10 and 11).

Prior to 1986, all "sales through dealers and carriers, street vendors, and counter sales", as recorded in the Statement of Ownership, Management and Circulation, were in fact counter sales at the office of *The Nashville Record* in the Stahlman Building in downtown Nashville. Prior to 1986, *The Nashville Record* did not have any dealers, carriers, or street vendors; *The Nashville Record* was not available at magazine racks, retail bookstores, newspaper stands, vending machines, or drive-in markets. (Record in Appeal 89-245-II, Transcript, Volume I, pages 42-45 and Appellants' Trial Exhibit 12).

In 1978-1979, Multimedia also published the following newspapers, each of which had broad coverage of local news, were used for publication of legal notices in their respective circulation areas, and had the listed average circulation for the indicated periods:

Gallatin News Examiner	(1980-5935 copies)
Hendersonville Star News	(1981-10304 copies)
Ashland City Times	(1978-2904 copies)
Dickson Herald	(1978-7234 copies)
Stewart-Houston Times	(1978-3241 copies)
Clarksville Leaf Chronicle	(1978-17802 copies)

(Record in Appeal 89-245-II, Transcript, Volume I, pages 79-85, 92-93, and Appellants' Trial Exhibits 16 and 18).

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[3] The numbers set forth in the Court of Appeals Opinion included additional copies which were printed but not distributed.

The 1987 daily circulation of *The Nashville Tennessean* was approximately 120,000, and the 1987 daily circulation of *The Nashville Banner* was approximately 60,000-70,000. (Record in Appeal 89-245-II, Transcript, Volume I, pages 177-178).

The 1970 population of Metropolitan Nashville and Davidson County was 447,877, while the 1980 population was 477,811. (Table of County Population, 1900-1980, Volume 13 of the Tennessee Code Annotated, page 824).

Wendell Smith Restaurant, Liquor Store, and related businesses have been prominently operated at 5300 Charlotte Avenue in Nashville, Tennessee, at least since 1958, many years prior to the tax sales. (Record in appeal 89-245-II, Transcript, Volume I, page 16)

In 1982, Appellants brought separate actions (which were later consolidated) seeking to set aside 1979 tax sales of properties to McCullough and C & N, and complied with all statutory prerequisites for instituting such actions. Each Complaint alleged that the decree authorizing the tax sale was void because the Appellants, whose title to the subject property was shown by the local public records, were indispensable parties to any action seeking to sell their property for delinquent taxes, but were not made parties by actual or constructive service of process or notified of those tax enforcement proceedings. (App. E. at A-25 and App. F at A-29) In each instance, the only service or notice attempted was constructive service of process for a deceased former owner (John Edney) whose Will was probated approximately nine years prior to the filing of the delinquent property tax actions. The Complaints also alleged that the tax sales were void because Appellants were entitled to notice of the tax sale auctions (to be held pursuant to the decrees of sale), in accordance with T.C.A. § 67-2018, and notice was not given in that manner.

In response to the Complaints, the Appellees filed Motions to Dismiss for failure to state a claim (which were treated as Mo-

tions for Summary Judgment), contending that Appellants' failure to register their names and addresses with the tax assessor, as required by a 1976 statutory amendment to Section 67-2018, made it unnecessary that they be made parties to or be notified of the delinquent property tax proceedings. Appellants, in their Memorandum Brief in Opposition to the Motions to Dismiss argued that Section 67-2018 was not properly construed in the manner which Appellees contended and that, if it were so construed, the section would violate the Due Process Clause of the Fourteenth Amendment. App. G, at A-37 - 38.

The Chancellor sustained the Motions to Dismiss, holding that the failure of the Appellants to comply with a statute requiring them to notify the tax assessor of their ownership interest obviated the necessity for any attempted service of process (actual or constructive) upon Appellants (or co-owners of said properties whose interests Appellants have now acquired by devise and inheritance).[4] The Chancellor did not address Appellants' contention that 67-2018 could not be constitutionally interpreted in that manner.

Appellants subsequently appealed the Chancellor's decision to the Court of Appeals, attacking the decision on various grounds, including the following grounds set forth in the Argument propositions of Appellants' Brief:

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[4] The Chancellor's holding established, for the first time, the effect of the failure of a property owner (whose ownership was shown in the public records) to comply with the requirement, added in 1976, that owners register their names with the assessor. This holding departed from a long line of Tennessee appellate authority that the taxpayer must be before the court by actual or constructive service of process, even though the suit was a proceeding in rem. See the discussion in the Excerpts from Appellants' Opening Court of Appeals Brief, App. I at A-48 - 54.

I. THE DECREES ORDERING PLAINTIFFS' PROPERTIES TO BE SOLD FOR DELINQUENT TAXES ARE VOID BECAUSE PLAINTIFFS WERE NOT PROPERLY BEFORE THE COURT BY ACTUAL OR VALID SERVICE BY PUBLICATION AND WERE NOT PARTIES TO THE DELINQUENT TAXPAYERS SUIT.

* * *

B. The Tennessee Procedure Governing Delinquent Taxpayers Actions, Including Section 67-2018, Violates the Due Process Clause of the Fourteenth Amendment if, Properly Interpreted, it Permits the Sale of a Taxpayer's Property where that Taxpayer is the Record Owner of the Property and is Neither Served with Process nor made a Party to the Delinquent Taxpayers Proceeding.[3]

The Court of Appeals, in an Opinion dated October 18, 1983, sustained the Chancellor's holding that the Appellants' failure to notify the tax assessor of their ownership interest precluded the necessity of any service of process upon them or notice of the proceeding to sell their property for delinquent taxes. That Court did not address the argument that such a construction of T.C.A. § 67-2018 violated the Due Process Clause.

The Tennessee Supreme Court granted a limited permission to appeal, and held that the Chancellor improperly decided that publication of the tax sale auction notices in *The Nashville Record* was adequate notice without the benefit of any evidence in the record, stating:

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[3] While the due process issue was raised in the trial court, constitutional issues may be raised in Tennessee at any time, including at the appellate level. *Shaw v. Woodruff,* 156 Tenn. 529, 3 S.W.2d 167 (1928), *Veach v. State,* 491 S.W.2d 81 (Tenn. 1973), and *State v. Goins,* 705 S.W.2d 648 (Tenn. 1988).

> We agree with the decision of the Court of Appeals on the issues that were addressed in its opinion. However, the issue of the adequacy of notice was not addressed, although it had been brought to the attention of the Court of Appeals in Plaintiffs' brief and in Plaintiffs' petition to rehear. We therefore remand the case to the trial court for further proceedings relative to the notice issue. . .

After remand to the Chancery Court, Appellee Multimedia, Inc. (the publisher of *The Nashville Record*) was granted permission to intervene in these consolidated actions.

On February 22, 1988, the Chancery Court of Davidson County tried the remaining issue in these consolidated actions; namely, whether the tax sales were void because the publication of the tax sales auction notices in *The Nashville Record* failed to meet applicable statutory and constitutional requirements. In the Trial Court, Appellants contended that *The Nashville Record* was not a proper newspaper, within the meaning of T.C.A. § 67-2018, for the publication of tax sale auction notices, and that even if *The Nashville Record* complied with statutory requirements, its use was inappropriate under the Due Process Clause because of its limited circulation. Appellants also contended that the Due Process Clause required that actual notice of the tax sale auction be given to property owners whose names are reasonably ascertainable, in addition to notice by publication in an appropriate forum. On February 24, 1989, the Chancellor rendered his Memorandum Opinion (Appendix J, at A-57), which held that *The Nashville Record* did meet applicable statutory and constitutional due process requirements for a newspaper in which tax sale auction notices could be published, that the tax sales of Appellants' properties were valid, and that the Complaints should be dismissed.

Appellants appealed the Chancellor's decision to the Tennessee Court of Appeals, again contending that publication of the tax sale auction notices in *The Nashville Record* failed to

meet applicable statutory and constitutional requirements and that other issues were properly before the trial court and should have been tried. The Court of Appeals affirmed the Chancellor, holding:

> We agree with the Chancellor that the dispositive issue is whether *The Nashville Record* is a newspaper of general circulation and whether the publication of tax sale notices therein satisfied the requirements of T.C.A. §67-5-2502, and those inherent in due process. We concur in his conclusion that the statutory and constitutional requirements were satisfied, ... (Appendix C at A-8).

ARGUMENT

The decisions below should be reviewed because they have departed from a clear line of authority established by this Court over the last forty years, holding that owners of property being sold for delinquent taxes must be given actual notice or be served with process in the tax enforcement proceeding, if their identity and addresses are reasonably ascertainable, and that notice by publication is only sufficient if they are not reasonably ascertainable.

In the October 18, 1983 decision the Tennessee Court of Appeals held that neither actual nor constructive notice was required where the property owners had failed to comply with a Tennessee statute requiring them to register their names and addresses with the local property assessor. Under that holding it was immaterial whether the property owner's interest was established by duly recorded deed or duly probated will,[6] or whether the property owner's identity and address were reasonably ascertainable. In the December 29, 1989 decision, that Court held that actual notice of the property tax auction sale (the notice given after entry of the decree of sale) was not required to be given to property owners who fail to register with the tax assessor even though their names and addresses might be reasonably ascertainable, but rather that due process was satisfied by one tax sale auction notice, naming only owners shown on the assessor's records, published in a local legal newspaper which at the time had an average paid circulation and total distribution of less than 1,000 in a metropolitan area of more than 450,000.

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[6] In Tennessee absent specific authorization in the will or an insolvent estate, real property is not a probate asset, which the personal representative must convey to the devisees. See e.g., T.C.A. §30-2-301, §§30-2-401 et seq., and §31-2-103.

In a series of decisions this Court has held that property owners, whose identity and addresses are reasonably ascertainable, must receive actual notice of proceedings to sell their property for delinquent taxes. The leading case of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950) held that due process required a form of notice reasonably calculated under the circumstances to apprise the holder of a legally protected property interest of the pendency of the action and that notice by publication is insufficient where the identity and location of the property owner were known. In the latter instance, actual notice was required while notice by publication was permissible for unknown owners.

The *Mullane* rationale was applied to actions to sell property for delinquent taxes in *Covey v. Town of Somers*, 351 U.S. 141, 100 L.Ed. 1021, 76 S.Ct. 724 (1956). There, this Court held that due process required actual notice to be given to the guardian of an incompetent whose property was to be sold for delinquent local taxes and notice to the incompetent was insufficient to apprise the property owner of the action and afford the incompetent an opportunity to present objections.

Similarly, in *Nelson v. City of New York*, 352 U.S. 103, 1 L.Ed.2d 171, 77 S.Ct. 195 (1956), the Court held that actual notice given to the proper address of trustees who were owners of property being foreclosed for delinquent taxes satisfied due process, although the notice failed to reach the trustees because it was concealed by the trustees' employee.

The *Mullane* rationale was extended to condemnation proceedings in *Walker v. City of Hutchinson*, 352 U.S. 112, 1 L.Ed.2d 178, 77 S.Ct. 200 (1956) where the Court held that publication alone for a property owner whose name was shown by the official local records was insufficient notice to meet due process requirements. The Court noted that it "is common knowledge that mere newspaper publication rarely informs the landowner of proceedings against his property" and that "[i]n

too many instances notice by publication is no notice at all." 352 U.S. 112 at 116-117.

Also, in *Schroeder v. New York City,* 371 U.S. 208, 9 L.Ed.2d 255, 83 S.Ct. 279 (1962), this Court held that publication in a newspaper and posted notices were inadequate to inform a property owner of condemnation proceedings when his name and address were readily ascertainable in the deed records.

More recently, in *Mennonite Bd. of Missions v. Adams,* 462 U.S. 791, 77 L.Ed.2d 180, 103 S.Ct. 2706 (1983), this Court reaffirmed that these principles were generally applicable to proceedings to sell property for delinquent taxes or to foreclose statutory property tax liens. This Court held that a mortgagee identified in a publicly recorded mortgage was entitled to actual notice of the proceeding to sell the mortgaged property for delinquent taxes, rather than just notice by publication, finding the mortgagee had a substantial property interest entitled to due process protection even though the property owner had received actual notice of the proceeding. Constructive notice by publication was insufficient where the mortgagee was reasonably identifiable. Again, the Court noted that notice by publication was unlikely to reach those who have an interest in property but who do not make special efforts to keep abreast of delinquent property tax sales, especially where the notice fails to contain the name of the property owner. The Court held:

> Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interest of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable. 462 U.S. at 800.

This Court's latest opportunity to consider the *Mullane/Mennonite* doctrine is the case of *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 99 L.Ed. 2d 565, 108 S.Ct. 1340 (1988). There the Court reiterated the holding of *Men-*

nonite quoted above, holding that due process required actual notice to be given to known or reasonably ascertainable creditors of a decedent and that notice by publication was only permissible for those who were unknown or not reasonably ascertainable.

Under the Tennessee statutory procedure governing the enforcement of local tax liens, notice of the proceeding is given at the time the proceeding is filed—by service of process—and after the decree of sale is entered—by the publication of one auction sale notice in a newspaper. Under the interpretations of that procedure by the Tennessee Court of Appeals in this case, the first notice (whether in the form of actual notice or constructive notice by publication) *is not required to be given to the property owner at all* unless the property owner has registered his name and address with the local property assessor. This rule applies regardless whether his property interest is shown in the local deed or probate records or is reasonably ascertainable from those records. The second notice may be given solely by publication of the auction sale notice in a legal newspaper; no actual notice is required. Furthermore, the published notice is not required to name the property owner unless his name has been registered with the local assessor; and the use of a newspaper having an average total circulation of less than 1,000 in a metropolitan of over 450,000 is sufficient to satisfy due process.

Under these holdings, notice of the tax enforcement proceedings is not required to be given to property owners, whether or not they are known or are reasonably ascertainable, unless the owners have complied with their statutory obligation of registering with the local assessor. Compliance with this registration requirement, in addition to property ownership, is now a prerequisite to due process or notice to property owners in Tennessee, no matter how reasonably ascertainable a property owner's name may be. Thus, the Tennessee Court of Appeals rulings are squarely in conflict with the principles enunciated repeatedly by this Court over the last forty years.

Under the rationale adopted by the Tennessee Court of Appeals, there is no requirement of actual notice to a property owner whose deed is duly recorded, in contrast to the notice required to be given to the property owner shown on the official records in the *Walker* and *Schroeder* cases or to the property owner and mortgagee whose interests were duly recorded in *Mennonite.*

When the Court of Appeals holdings were applied to the fact situation present here, there was no requirement of actual notice to the appellant property owners, or to their predecessors in interest (other than John Edney), even though their property ownership interests were shown by duly probated wills which were a public record in Davidson County, Tennessee. Moreover, under this rationale there is not even a requirement of constructive service for, or notice by publication to Appellants. Instead, service of process by publication for a man who had been dead and whose will had been duly probated for nine years was held sufficient by itself, to comply with due process and to support the decrees ordering the sale of Appellants' properties for delinquent taxes. Furthermore, after the decrees of sale were entered, there was no requirement of actual notice to Appellants (or their predecessors) of the tax sale auction; instead, notice by publication naming only the decedent as the property owner was held sufficient to meet due process requirements and was found to be "the best notice possible under the circumstances." Appellants respectfully submit that this interpretation of the Due Process Clause directly conflicts with the line of authority outlined above.

Review by this Court is urgently needed because these holdings form the genesis of a dangerous new precedent that ownership of property is not alone sufficient to require compliance with traditional due process mandates; instead, due process may be conditioned upon fulfillment by the property owner of the new statutory registration obligation. Appellants submit

that such a precedent should not be established and that the dangerous nature of such a precedent requires this Court's review.

Finally, this Petition presents this Court with the issue of the manner in which notices, which may be given by publication (for instance to owners whose property interests are not reasonably ascertainable), must be published in order to comply with due process requirements. As previously noted, this Court has repeatedly pointed out that newspaper publication rarely informs a property owner of proceedings affecting his property. Because *Mullane* requires that the form of notice be one "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of action and afford them an opportunity to present their objections," logically the form of publication, employed under circumstances where publication alone is permissible, should also meet this standard. Appellants maintain that a legal newspaper of the limited actual circulation of *The Nashville Record* does not meet that standard, regardless whether it meets state law standards for a newspaper in which legal notices may be published. Instead, the form of publication meeting the *Mullane* standard should be at the very least, a publication that is widely disseminated and circulated throughout the jurisdiction in which publication is to be made. Thus, the Tennessee Court's holding that *The Nashville Record* is an appropriate forum for publishing notices complying with due process conflicts with the rationale of the *Mullane* decision and its progeny and should be reviewed by this Court.

In summary, this Court has repeatedly held that due process requires that actual notice must be given to reasonably ascertainable owners of property, which is to be sold for delinquent taxes, and that constructive notice must be given to those owners who are not reasonably ascertainable. The lower court holdings have departed materially from these principles and have added a dangerous new prerequisite to due process. Accordingly, this Court should review and reverse those holdings of the Tennessee Court of Appeals.

CONCLUSION

For the reasons stated above, this Court should grant Appellants' Petition for a Writ of Certiorari to the Tennessee Court of Appeals.

Respectfully submitted,

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APPENDICES

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APPENDIX A

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

BEVERLY ANN COOK, ET AL,
Plaintiffs-Appellants,

vs.

ARAMINTA McCULLOUGH, ET AL,
Defendants-Appellees,

No. 83-207-II
DAVIDSON EQUITY

DIRECT APPEAL FROM THE DAVIDSON COUNTY CHANCERY COURT, PART I, AT NASHVILLE, TENNESSEE

HONORABLE IRVIN H. KILCREASE, JR., CHANCELLOR

FILED: OCT. 18, 1983

OPINION

The appellants, alleging that by will or intestate succession they were the owners of property previously sold at a tax sale, sued to invalidate the sale on the ground that they were not served or otherwise given notice of the action. The Chancellor dismissed their claim. We affirm.

The appellants filed separate actions in the court below to invalidate the sale of two tracts of land sold at a tax sale on January 25, 1979. The complaint alleged that John S. Edney, the record owner of the two parcels in question, died on March 14, 1969 and left all his property by will to his four sisters. The will was duly probated in Davidson County, Tennessee. The appellants take their interest in the property by will or intestate

succession through one of the four sisters. Since the appellants were not served with process in the tax sale nor had any other notice of the sale, they alleged that the sale was void as to them.

The purchasers at the tax sale were made parties to the action along with the trustee and the tax assessor of the Metropolitan Government of Nashville and Davidson County, Tennessee. The defendants filed answers or motions to dismiss and the cases were consolidated for disposition. Since the basis for the motions to dismiss was that the complaint failed to state a cause upon which relief could be granted and matters outside the pleadings were considered by the court, the motions were treated as motions for summary judgment pursuant to Rule 12.02 of the Tennessee Rules of Civil Procedure. The lower court granted the motions and dismissed the complaints. By agreement the court filed findings of fact and conclusions of law.

It is the position of the appellants that since the will of John Edney was of record in Davidson County, it was possible for the taxing authorities to ascertain the present owners of the property in order that they might be given notice of the suit to collect delinquent taxes.

The defendants all contend that the burden is on the property owner to notify the tax assessor of his or her interest in the property in order that notice may be given.

In this respect the defendants rely on T.C.A. § 67-2018 which deals with the question of notice to the present owner. That section provides:

> In the event of a sale under a decree of the court, the property shall be advertised in one (1) sale notice, which notice shall set out the names of the owners of the different tracts of parcels of land and a concise description of the property and the amount of judgment against each defendant. Said advertisement may be by publication in a

newspaper as required by law, or by printed handbills as the court may decree.

However, notice of the sale shall be sent by registered return receipt mail to the last known address of the present owner of any real property if the delinquent taxes for which the sale is to be conducted were assessed on the real property when owned by a prior owner of the real property.

The term "last known address of the present owner" shall be defined as the address of the owner of said property on record in the tax assessor's office of each county.

It shall be the responsibility of the property owner to register his name and address with the tax assessor of the county in which the land lies.

The property owner shall bear the cost of the registered return receipt mail and if the said registered mail is not claimed within twenty (20) days following mailing, the county may proceed as though the notice had been received.

It seems obvious that the above section dealing with a notice to be given in a suit for the sale of real property for taxes puts the burden on the present owner of the property to register his name with the tax assessor so that he may get notice in the event of a sale.

The appellants contend that since the will of John Edney was of record, the plaintiffs became the "record owners" and were entitled to notice without more. We cannot accept that interpretation of the statute. We think the statute says the opposite: The owner is required to register his name and address with the tax assessor rather than the taxing authorities being required to search the records for evidence of ownership. This result is consistent with the recent case of *Morris v. Beard,* Tenn.App. (Filed in Knoxville February 12, 1982).

The action to sell real estate for delinquent taxes is an action in rem. T.C.A. § 67-1804. Although persons having an interest in property which is the subject of an in rem proceeding are entitled to notice, the notice required is "the best notice possible under the circumstances." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Baggett v. Baggett*, 541 S.W.2d 407 (Tenn.1976). In this case, since the appellants' interest was not on record in the tax assessor's office as required by the statute, they were not entitled to any more notice than that given them by publication in the newspaper.

For all of these reasons the decree of the Chancellor is affirmed and the cause is remanded to the Chancery Court of Davidson County for any further proceedings necessary.

Tax the costs on appeal to the appellants.

/s/ Ben H. Cantrell, Judge

CONCURRING:

/s/ Henry F. Todd, P.J., M.S.

/s/ Samuel L. Lewis, Judge

APPENDIX B

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

BEVERLY ANN COOK, CLAUD RICHARD DOTY, WENDELL L. SMITH, JR., and LINDA SMITH WEST,
Plaintiffs-Appellants,

v.

ARAMINTA McCULLOUGH: C & N LEASING & RENTAL CO., INC.; JIM ED CLARY, Property Assessor of the Metropolitan Government; and BILL GARRETT, Trustee of Davidson County,
Defendant-Appellees.

November 19, 1984

NOT FOR PUBLICATION

Appeal from the Court of Appeals

DAVIDSON EQUITY

Hon. Irvin H. Kilcrease, Chancellor.

OPINION

We granted a limited application for permission to appeal in this case to consider whether the Chancellor erred in holding that the publication of notice of tax sale in the *Nashville Record* was adequate notice to Plaintiffs when there was no evidence in the record on that issue and without permitting the introduction of such evidence in a trial on the merits. The Chancellor granted Defendants' motion to dismiss for failure to state a claim upon which relief could be granted. Since matters outside the pleadings were considered, the Chancellor correctly treated the motion as one for summary judgment. The Court of Appeals affirmed the judgment of the Chancellor but its opinion

did not discuss the notice issue. Plaintiffs filed a petition to rehear in the Court of Appeals, alleging, among other things, that the Court of Appeals failed to consider Plaintiff's attack on the adequacy of notice in the *Nashville Record*. Plaintiffs' petition to rehear was overruled. After consideration of the record in this case, the briefs and argument of counsel, we are of the opinion that the Chancellor erred in holding that the notice was adequate without permiting the introduction of evidence on the issue and we accordingly remand the case for further proceedings.

In his amended findings of fact and conclusions of law, the Chancellor held that "Publication in the *Nashville Record* constitutes adequate notice to all parties." The record contains no evidence on the issue of adequacy of notice and no proof was presented on the issue by either side. The Chancellor cited no authority for his position. We are of the opinion that the Chancellor should have permitted proof on this issue and summary judgment was therefore inappropriate.

We agree with the decision of the Court of Appeals on the issues that were addressed in its opinion. However, the issue of the adequacy of notice was not addressed, although it had been brought to the attention of the Court of Appeals in Plaintiffs' brief and in Plaintiffs' petition to rehear. We therefore remand the case to the trial court for further proceedings relative to the notice issue. Costs of this appeal shall be taxed to the Defendants.

PER CURIAM

APPENDIX C

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, SITTING AT NASHVILLE

BEVERLY ANN COOK, CLAUD RICHARD COOK [SIC], WENDELL L. SMITH, JR., LINDA SMITH WEST,

Plaintiffs-Appellants,

v.

ARAMINTA McCULLOUGH: C & N LEASING AND RENTAL CO., IND.; JIM ED CLARY, PROPERTY ASSESSOR OF THE METROPOLITAN GOVERNMENT; BILL GARRETT, TRUSTEE OF DAVIDSON COUNTY; AND MULTIMEDIA, INC. d/b/a THE NASHVILLE RECORD,

Defendants-Appellees,

No. 89-245-II

Davidson Chancery

Hon. Irvin Kilcrease, Jr., Chancellor

AFFIRMED

OPINION FILED: Dec. 29, 1989

OPINION

All of the issues in this perennial litigation were resolved by the Supreme Court of Tennessee except that of adequacy of notice of the tax sale and the case was remanded to the trial court "for further proceedings relative to the notice issue." The trial court resolved this issue contrary to the insistence of the appellants, and the case thus wends its way through the appellate process for the fourth time. The parties do not agree upon the posture of the case or upon the issues presented for review; appellants insist that the enquiry should be directed not only to the

issue of adequacy of notice of publication, but to the content of the notice, while the appellees insist the controlling issue, as held by the Chancellor, is whether publication of notice in *The Nashville Record* satisfied statutory and constitutional requirements. We agree with the Chancellor that the dispositive issue is whether *The Nashville Record* is a newspaper of general circulation and whether the publication of tax sale notices therein satisfied the requirements of TCA 67-5-2502, and those inherent in due process. We concur in his conclusion that the statutory and constitutional requirements were satisfied, and affirm the denial of the plaintiffs' motion to amend, following remand, to add new issues, and the denial of their motion for summary judgment.

I

These consolidated actions were filed on January 21, 1982, seeking to set aside tax deeds executed on January 25, 1979, to Defendants William C. and Araminta McCullough and C&N Leasing and Rental Company, Inc., as a result of a tax sale to satisfy delinquent taxes levied upon the described properties. The Plaintiffs are the heirs, or the assigns of the heirs, of John S. Edney, who died on March 14, 1969, and who at the time of his death was the owner of the properties that are the subject of this case. The tax sale was held in 1979 as a result of delinquent taxes accruing between 1971 and 1976. Neither the Plaintiffs nor their predecessors were named as parties to the tax sale suit and were not served with notice of the tax sale. They alleged that they were entitled to notice of the delinquent taxes, that they were indispensable parties to the suit and that the tax sale is void as a result of the failure to give them such notice and to join them as parties to the suit.

On September 22, 1982, the Chancery Court granted summary judgment for the Defendants and dismissed the Complaint, holding that the Plaintiffs' failure to notify the Tax Assessor's Office of their ownership, as required by Tenn. Code

Ann. 67-5-2502, barred their claim of lack of notice of either the delinquent tax assessments or the tax suit, and that "publication in *The Nashville Record* constitutes adequate notice of all parties".

On appeal, this Court affirmed the judgment. We held that under §67-5-2502, the burden is on the property owner, not the taxing authorities, to register his name and address with the taxing authorities, and since the Plaintiffs' interest was not on record in the Assessor's Office as required by statute, they were not entitled to any more notice than that given them by publication in the newspaper.

The Supreme Court of Tennessee affirmed the judgment of this Court that the failure of the plaintiffs to notify the Assessor of a change in ownership barred their claim of lack of notice other than by publication, but reversed the Chancery court insofar as it concluded that publication in *The Nashville Record* constituted adequate notice to all parties. On this latter issue, the Supreme Court held that the Chancery Court had erred in making such a determination without presentation of evidence, and further noting that this Court had failed to address this separate issue.

On remand, Multimedia, Inc. d/b/a *The Nashville Record,* by agreed order, was allowed to intervene as a party Defendant.

On February 28, 1986, the Plaintiffs filed a Motion to Amend their Complaint to allege that TCA §67-5-2502 and §67-2515, (1976), violated their procedural rights to due process, insofar as these statutes operated to permit a tax sale of their property without joining them as parties Defendant to a tax sale suit or according them notice by mail or personally or otherwise except by publication. The Chancellor denied this Motion, concluding that such new allegations were barred under the doctrine of the law of the case.

On November 7, 1986, this Court granted an application filed by the Plaintiffs for an extraordinary appeal from the order of

the Chancellor denying their motion to amend. See, *Cook, et al v. McCullough,* 735 SW2d 464 (Tenn. app. 1987), wherein we held that the Supreme Court's decision "approved and affirmed the conclusion and judgment of this Court that, by failure to register their names as owner/taxpayers of the subject property, plaintiffs forfeited the right to notice of the tax suit and of tax sale." We concluded, however, that,

> ..."plaintiffs would have standing to question the adequacy of the notice to the owner on record with the tax assessor. This is being true, the limited purpose of the issue on remand (adequacy of published notice) was to ascertain whether the publication in *The Nashville Record* was adequate notice to the taxpayer (the record owner, John S. Edney, deceased) of the pending action and to the public at large that the property was to be sold for taxes." *Id.*

We then summarized the issues within the scope of remand before this Court as follows:

> "In summary, the holdings of this Court, as affirmed by the Supreme Court, and the holding of the Supreme Court as to limit of remand constitute the complaint, constitutional or otherwise, as to the omission of the names of plaintiffs from the tax sale proceedings or any notices pursuant thereto. *National Life & Acc. Ins. Co. v. Morrison,* 179 Tenn. 29, 162 SW2d 501 (1942); *Life & Cas. Ins. Co. v. Jett,* 175 Tenn. 295, 133 SW2d 997 (1939); *Fields v. Gordon,* 33 Tenn. App. 465, 232 SW2d 320 (1948); *Securities Investment Co. v. White,* 19 Tenn. App. 540, 91 SW2d 581 (1935). On the other hand, the remand by the Supreme Court appears to leave open any other questions of fact or law relating to the adequacy, constitutional, statutory, or otherwise, of the notice which was published. That is, the Trial Court is free to hold that the notice was inadequate for any reason except that plaintiff's [sic] names were omitted therefrom.

> The amendment offered by plaintiffs was in part in contradiction of the law of the case and otherwise was unnecessary to the execution of the remand by the Supreme Court.
>
> Neither the Trial Judge nor this Court has authority to expand the limitation placed by the Supreme Court upon a remand."

The Plaintiffs thereafter filed a Motion for Summary Judgment in the trial court on the grounds that the notices did not contain an adequate or concise description of the properties and did not show the amount of the judgment for delinquent taxes. The Chancellor held that the Plaintiffs' Motion for Summary Judgment should be overruled because the issues therein raised were outside the scope of the Order of Remand and therefore contrary to the law of the case. He further held that *The Nashville Record* is a newspaper of general circulation and that publication of tax sale notices therein satisfies the requirements of TCA 67-5-2502 and that publication of the tax sales therein was constitutionally adequate under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

II

The Nashville Record was first published on January 21, 1936, and celebrated its fiftieth anniversary edition on October 30, 1986, by relating its history from its founding by Edward Webb, his ownership of the newspaper for over twenty years, its ownership by the Charlett family for over seventeen years, and the purchase of the newspaper in 1973 by its present owner, Multimedia, Inc. of Greenville, South Carolina.

In 1978 *The Nashville Record* was published weekly, and for most of its existence it has been published weekly. It was then tabloid in format and carried seven editorial and advertising columns to the page. It was about 14 inches deep and about 10 inches wide, usually consisting of 24 to 32 pages. Each issue was

printed on newsprint. In approximately 1979 it was changed from a seven column format to a four column format, consistent with trends in the newspaper industry. The advantage of this change was that editorial columns from news agencies could be produced to fit in the newspaper in a more consistent fashion.

It continues to be published in Nashville, Tennessee every week, and is a member of several state and national trade organizations, including the Associated Court and Commercial newspapers, the National Association and the Tennessee Press Association. A newspaper must be considered to be a "newspaper of general circulation" before the Tennessee Press Association will admit it to membership.

The general nature and content of *The Nashville Record* has basically remained the same over the years. It publishes news of general interest designed to attract readership from the general public, such as general news stories, editorials, records of births, deaths, divorces, new incorporations, marriages, motion dockets from Circuit and Chancery Courts, real estate transfers, real estate mortgages, creditors' notices, public notice advertisements, building permits, developments in the commercial land and building industry, homes, etc. Local news is featured, and appears on a regular basis. National and international news appears from time to time. Stock market and similar financial news appear from time to time, but are not carried in a special format.

There are no religious, social or sports columns on a regular basis.

The December 28, 1978 issue of *The Nashville Record,* in which issue the relevant tax sale notices were published, was fairly representative of the weekly publications during 1978. The front page was headlined "First American National Bank Promotes Officers". A column entitled "Nashville Business Briefs" contained stories about Shoney's growth, the election

of officers of the Nashville Security Dealers and the new chief administrator of Parkview Hospital. The front page also contained a story about the promotion of R. Steven Willis at United American Bank and an editorial (with photograph) by Judge John L. Draper. The front page contained a table of contents. Page two contained a timely editorial concerning the events in Iran, an article by M. Lee Smith concerning criminal allegations against the Blanton administration, a report from Senator Sasser, a Jack Anderson column on the Iranian situation and an editorial cartoon pertaining thereto. The third page contained the Chancery motion docket, a notice under the Age Discrimination in Employment Act and a news article concerning a rate hike sought by Allstate Insurance Company. Page four contained information pertaining to mortgages and real estate transfers and notices of Chancery sales, including one of the publications at issue in this litigation. Page five contained information pertaining to real estate transfers and various legal notices. Page six contained information concerning real estate transfers and listed recent divorce actions. Pages seven and eight contained information pertaining to real estate transfers and several notices, including Chancery sale notices. Page nine contained sales and creditors' notices. Pages ten and eleven contained information concerning real estate transfers, notices to creditors and orders of publication in Chancery Court. Page twelve contained a news article entitled "Bar Opposes Cost Recovery", a news article entitled "McWherter Urges Speedy Trials" and various legal notices. Page thirteen contained additional real estate transfer information, various legal notices, and Probate Court filings. Page fourteen contained additional real estate information and various legal notices. Pages thirteen, fourteen and fifteen contained additional real estate information and various legal notices. Page sixteen contained additional real estate information, various legal notices, a listing of marriages and the Order for publication in this litigation. Page seventeen contained a news article about a speech by Kenneth L. Roberts concerning the economic outlook for the new year, an

article concerning Army National Guard funds and various legal notices. Page eighteen contained an article entitled "Diesel Fuel Use to Rise", various legal notices and a listing of bankruptcies filings. Page nineteen contained further real estate information, various legal notices and a list of "Newcomers". Pages twenty and twenty-one contained various notices, a listing of new suits in Chancery Court and a listing of a new suits in Circuit Court. Page twenty-two contained a news story entitled "How to Buy or Sell Home" and various legal notices. Page twenty-three contained a news article entitled "Fuel Reserves Dwindling", a news article entitled "U. S. Savings Bonds Purchases Flourish", a photograph of a worker drilling for oil and various legal notices, including the J. S. Edney notice at issue in this litigation. Page twenty-four contained a news story entitled "Dairy Farmers Meet in Atlanta", a news story entitled "Real Gasoline Price Same as 1960" and various legal notices. Page twenty-five contained a news story entitled "Nine Wins State Photo Contest" and various legal notices. Page twenty-six contained a continuation of the news stories from page one, a news story entitled "Hardaway Buys Babb and Associates", a news story entitled "New Office Established" regarding J. C. Bradford & Co., a news story entitled "Department Chain to Open Here", a news story entitled "Nashvillians Elected Officers" and a photograph with accompanying test relating to a Department of the Arm Incentive Program for its personnel. Page twenty-seven contained a listing of insurance filings, a legal notice, a photograph of the Tennessee State Photo Contest winners and several advertisements.

The Statement of Ownership, Management and Circulation published in the September 18, 1978 edition of *The Nashville Record* showed the average number of copies of each issue published during the preceding twelve months as 1,401 and the actual number of copies of the single issue published nearing the filing date as 1,446.

The Statement of Ownership, Management and Circulation published in the September 28, 1979 edition of *The Nashville*

Record showed the average number of copies of each issue published during the preceding twelve months as 1,254 and the actual number of copies of the single issue published nearing the filing date as 1,150.

The subscriber list of *The Nashville Record* dated September 25, 1978 and its accounts receivable balance register dated September 25, 1978 reflect the subscriber base for the newspaper, including such subscribers as lawyers, title companies, court clerks, real estate agents, banks, a potato service, a answering service, a furiture company, government agencies such as the Metropolitan Planning Commission, car dealerships, construction companies, manufacturing industries, moving and storage companies, insurance agencies, adjacent municipalities, radio and television stations, the Tennessee Press Association, the State of Tennessee, the United States Department of Housing and Urban Development, hospitals, funeral homes, universities, medical doctors, libraries, churches, a waterbed company and members of the general public.

In 1978, with respect to public notices to creditors or notice of service of process or foreclosure or Chancery Sales, *The Nashville Record* had no competitors in the Nashville community. *The Tennessean* and *The Banner* did not carry such notices to creditors, notices of service of process, notices of foreclosure, notices of Chancery sale or any notices of that nature. The clerks' offices and the lawyers of this community have used *The Nashville Record* for publication of notices to creditors, notices of service of process, notices of foreclosure, notices of Chancery sale and notices of that nature almost exclusively.

III

The Chancellor allowed the testimony of Kelly Leiter, Dean of the College of Communications at the University of Tennessee in Knoxville and professor of Journalism. He has been employed by the University for 22 years and has been a Dean

since 1984. Prior to that time he was a teacher at Southern Illinois University for 6 years and for 12 years before that was a newspaper reporter and writer and editor for *The Indianapolis News, The Chicago Daily News, The Washington Star,* the *Highly Home News* and *Life Magazine.* He has long been associated with the Tennessee Press Association. He has a Bachelor's Degree in Journalism from Indiana Univerty and a Masters Degree in Journalism from Southern Illinois University.

In his opinion, the general characteristics of a newspaper include: (i) how often it is published and how frequently it is issued; (ii) the general content, which should appeal to a reasonably broad audience; (iii) the format and appearance, including the type, whether tabloid or broadsheet, whether printed on newsprint or news stock, whether there are headlines, photographs, pictures, captions, and whether it carries general advertising; and (iv) the circulation.

Dean Leiter testified that *The Nashville Record* in 1978 was published weekly on Thursday and had been for a number of years. It was a tabloid newspaper roughly about 12½ by 14 inches in size with a front news page with current news and an editorial page with columns, editorial cartoon and news stories. He thought the subscriber base of *The Nashville Record* was reasonably broad, and in his opinion it was a newspaper in 1978 and continues to be of general circulation as that term is used and understood in the newspaper business. He testified that *The Nashville Record* is a very logical and economic way for public notices to be served on the general public.

He was further of the opinion that traditionally newspapers of the nature of *The Nashville Record* do not have large circulations in comparison to daily newspapers, but that the pass-along readership tends to be much higher than it is in daily papers. A daily paper like *The Tennessean* or *The Nashville Banner* probably is read by about four people but the pass-along readership of a newspaper like *The Nashville Record* is much higher.

Dean Leiter concluded that publication in *The Nashville Record* was as reasonable a publication as any other available medium for the purpose of reaching persons who appeared on the tax rolls as owners of property but who were not to be found in the county by the service of process. Notices required to be published pursuant to court order have been for many years published in one publication in a community. This factor relates to the reasonableness of using some other medium for such publication, because it is reasonable to suppose that one would turn to the newspaper that has been used historically for the publication of such notices.

IV

The tax sale in the present case was conducted pursuant to TCA §67-2018 (1976) (recodified as §67-2502), which provided as follows:

> "Advertisement of sale — Notice to present owner. — In the event of a sale under a decree of the court, the property shall be advertised in one (1) sale notice, which notice shall set out the names of the owners of the different tracts or parcels of land and a concise description of the property and the amount of judgment against each defendant. Said advertisement may be by publication in a newspaper as required by law, or by printed handbills as the courts may decree.
>
> However, notice of the sale shall be sent by registered return receipt mail to the last known address of the present owner of any real property if the delinquent taxes for which the sale is to be conducted were assessed on the real property when owned by a prior owner of the real property.
>
> The term "last known address of the present owner" shall be defined as the address of the owner of said property on record in the tax assessor's office of each county.
>
> It shall be the responsibility of the property owner to

register his name and address with the tax assessor of the county in which the land lies.

The property owner shall bear the cost of the registered return receipt mail and if the said registered mail is not claimed within twenty (20) days following mailing, the county may proceed as though the notice had been received."

For the purposes of this case the key phrase is, "Said advertisement may be by publication in a newspaper as required by law . . .". No definition of "newspaper" was contained in that part of the code; and no general definition of "newspaper" appeared elsewhere in the code.[1] The key phrase first appeared in §12 of Chapter 77 of the Public Acts of 1923, and no definition of "newspaper" appeared in that act.

"As required by law" appears to have been a general reference to the statutory requisites for judicial sales, appearing as §3838, *et seq.* in Shannon's Code, now codified as TCA §35-5-101, *et seq.* The word "newspaper" is used in those statutes, but again without definition.

The Tennessee Supreme Court in an unpublished opinion in the case of *Record Publishing Co. v. Smith,* decided March 25,

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[1] Appellants cite the definition of 'newspaper of general circulation' appearing in §2-1-104(a)(12) TCA, and emphasize the last sentence thereof, "a newspaper which is not engaged in the distribution of news of general interest to the public, but which is primarily engaged in the distribution of news of interest to a particular group of citizens, is not a "newspaper of general circulation." However, the proof shows that *The Nashville Record* is "engaged in the distribution of news of general interest to the public." Moreover that definition is expressly confined to Title 2 governing elections and is not applicable by its express terms to Tile 67, TCA 2-1-104(a). In addition that definition was not adopted until 1972, Chapter 740 Public Acts of 1972. The general assembly in adopting the concept of "newspaper" in Chapter 77 of the Public Acts of 1923 for the purpose of tax sales could not have intended a definition appearing 49 years later for the purpose of election laws.

1937, held that *The Nashville Record* was a newspaper proper for the publication of legal notices required by law. The court expressly stated,

> "We think the Chancellor correctly held that 'complainant publishes a newspaper legal and proper for the publication of legal notices.' Our statutes contain no specific requirements in this regard. Publication in 'a newspaper' is broadly called for. This, of course, must be construed to contemplate a regular, bona fide, publication, carrying news of interest to the public and published periodically at stated intervals. This is according to the definitions given by Webster and Bouvier. And, directly in point here, Bouvier says 'a paper devoted principally to legal intelligence is a newspaper in which notices required by statute may be published; 75 Ill., 51."

In *Moore v. Memphis,* 184 Tenn. 92, 195 SW2d 623 (1946) the complainant sought to set aside a tax sale on the ground, among others, that publication of notice in the *Daily News* of Memphis was not sufficient constructive notice. The complaint alleged that the *Daily News* had a circulation only among business and professional persons in Memphis. Rejecting the complainant's contention, and relying on *Pope v. Craft,* 1 Tenn. App. 356 (1925), the court held that publication in the *Daily News* was publication in a newspaper sufficient to afford constructive notice.

In *Pope v. Craft,* 1 Tenn. App. 356 (1925), a mortgagor challenged the validity of a foreclosure sale on the ground, among others, that the foreclosure sale had not been advertised in a newspaper as required by law. Notices of the sale had been published in the *Daily News,* which contained four pages consisting of, inter alia, a list of building permits, a column on stock and bond news, proceedings in local courts, various legal notices, jury calendars, a list of marriages and births, a note that progress was being made on the construction of a hotel and

guesses on the cotton crop. There was also testimony that 99% of the trustee sales of land in the county had been advertised for many years in that paper, and that the paper had a circulation of approximately 3,000 subscribers, who were principally lawyers, bankers and businessmen.

After discussing authorities holding or supporting the proposition that a newspaper devoted principally to "legal intelligence" is a newspaper in which notices required by statute or court order may properly be published, the court held that "The *Daily News* was and is a newspaper in the sense required by law and by the deed of trust directing the publication of the notice of sale."

Essentially the same concept of "newspaper" has been followed by the Supreme Court in construing the exemption of newspapers from the sales tax. Thus, in *Shoppers Guide Pub. Co., Inc. v. Woods,* 547 SW2d 561 (Tenn. 1977), the Commissioner of Revenue provided by Rule the following criteria for a newspaper to come within the statutory exemption of newspapers:

> "b. In order to constitute a newspaper, the publication must contain at least the following elements:
>
> (1) It must be published at stated short intervals (usually daily or weekly).
>
> (2) It must not, when its successive issues are put together, constitute a book.
>
> (3) It must be intended for circulation among the general public.
>
> (4) It must contain matters of general interest and reports of current events.
>
> c. Notwithstanding the fact that the publication may be devoted primarily to matters of specialized interest, such as legal, mercantile, political, religious or sporting matters, if, in addition to the special interest it serves, the alleged

> newspaper contains general news of the day, information of current events, and news of importance and of current interest to the general public, it is entitled to be classed as a newspaper."

The court held that "The criteria promulgated by the commissioner are in accord with the generally accepted usage of the term 'newspaper' ", citing *Pope v. Craft*, 1 Tenn. App. 356 (1925).

Clearly, under any of these expressions of the concept, *The Nashville Record* is a "newspaper" within the sense of the applicable statute. It is published weekly. It is intended for circulation among the general public. It contains matters of general interest. It is in the form of a newspaper. The fact that it circulates primarily among business and professional people having an interest in "legal intelligence" does not make it any the less a newspaper.

We agree with the conclusion of the Chancellor that

> "The evidence of record persuades the Court to conclude that *The Nashville Record* is a newspaper of general circulation and that publication of tax sale notices therein satisfies the requirement of TCA §67-2018 (now codifed in TCA §67-5-2502)."

V

The appellants persist that notice by publication in any medium was not sufficient to meet the requirements of due process. As the Chancellor pointed out, however, this court in a prior Opinion in this case, which was affirmed by the Supreme Court, expressly held,

> The action to sell real estate for delinquent taxes is an action in rem. TCA §67-1804. Although persons having an interest in property which is the subject of an in rem proceeding are entitled to notice, the notice required is "the

best notice possible under the circumstances." *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Baggett v. Baggett,* 541 SW2d 407 (Tenn. 1976). In this case, since the appellants' interest was not on record in the tax assessor's office as required by the statute, they were not entitled to any more notice than that given them by publication in the newspaper.

We agree with the appellees that the prior decision of this Court is the law of the case, and the contents of the publication is not properly before us.

There is no evidence in the record that publication in some other medium would have better satisfied due process than did publication in *The Nashville Record.* On the contrary, the evidence supports the conclusion that the publication in *The Nashville Record,* as opposed to some other medium, was the logical choice, because in 1978 it was the sole medium used in Davidson County for the publication of notices to creditors, notices of service of process, notices of foreclosure or notices of Chancery sales, including tax sales.

The test of due process in this context is whether the use of *The Nashville Record* was a reasonable, practical and economical effort to convey the legal intelligence contained in the notice - not, however, in the abstract, but as opposed to some other means of publication. *Mennonite Board of Missions v. Adams,* 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d, 180 (1983); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); and see, *Marlowe v. Kingdom Hall of Jehovah's Witnesses,* 541 SW2d 121 (Tenn. 1976).

We hold that publication therein of tax sales satisfied due process requirements.

It is pertinent to mention that owing to the failure of the asserted owners of the subject property to pay the taxes thereon

for six years, selected quotes from *Marlowe v. Kingdom Hall of Jehovah's Witnesses,* 541 SW2d 121 (Tenn. 1976) are relevant:

> "Every landowner knows that his property is subject to taxation and that they are paid to the county trustee on an annual basis. He is charged with the knowledge that taxes become a first lien upon his property from the first day of January of the year for which they are assessed..... This Court will not look with favor upon an attack made upon a tax sale where the taxes sued for were actually delinquent and unpaid at the time of sale and adequate public notice was given .... We particularly do not agree that the publication in this case was offensive "under the due process clause".... In our view...the due process clause....[does not] require that we depart from the established law in this jurisdiction that constructive notice is sufficient in such cases."

VI

Finally, we hold that the appellants may not enlarge upon the conditions of remand by the Supreme Court. If they conceived the Remand too restrictive, application for relief should have been made to the Supreme Court. Neither the Chancery Court nor this Court has the authority to modify an order of the Supreme Court. Rather, the appellants essentially and impermissibly insisted upon a relitigation of adjudicated issues or the introduction of new issues in the trial court.

The judgment is accordingly affirmed at the appellant's costs.

/s/ William H. Inman
Special Judge

CONCUR:

/s/ Ben H. Cantrell, Judge

/s/ W. Frank Crawford, Judge

APPENDIX D

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

BEVERLY ANN COOK, CLAUD RICHARD DOTY, WENDELL L. SMITH, JR., and LINDA SMITH WEST,

Plaintiffs-Appellants,

v.

ARAMINTA McCULLOUGH; C & N LEASING AND RENTAL CO., INC.: JIM ED CLARY, Property Assessor of the Metropolitan Government; BILL GARRETT, Trustee of Davidson County; and MULTIMEDIA, INC., d/b/a *The Nashville Record,*

Defendants-Appellees.

DAVIDSON EQUITY

ORDER

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be denied.

PER CURIAM

Cooper, J., not participating.

APPENDIX E

TO THE CHANCELLORS HOLDING THE
CHANCERY COURT AT NASHVILLE

No. 82-120-II

BEVERLY ANN COOK, CLAUD RICHARD DOTY,
WENDELL L. SMITH, JR. AND LINDA SMITH WEST,
Plaintiffs,

v.

WILLIAM C. McCULLOUGH AND ARAMINTA
McCULLOUGH; JIM ED CLARY, PROPERTY ASSESSOR
OF THE METROPOLITAN GOVERNMENT: AND
GLENN FERGUSON, TRUSTEE OF DAVIDSON COUNTY,
Defendants.

COMPLAINT

1. Plaintiffs Wendell L. Smith, Jr., Beverly Ann Cook and Linda Smith West are residents of Davidson County, Tennessee. Plaintiff Claud Doty is a resident of Cheraw, South Carolina.

2. Defendants William C. McCullough and Araminta McCullough are residents of Williamson County, Tennessee.

3. Defendant Jim Ed Clary ("Clary") is the duly elected and acting Property Assessor of the Metropolitan Government of Nashville and Davidson County, Tennessee, and, as such, has responsibility for assessing the value of real property and maintaining records of the names and addresses of owners of Davidson County property. Defendant Glenn Ferguson ("Ferguson") is the duly elected and acting Trustee of the Metropolitan Government of Nashville and Davidson County, Tennessee, and, as such, has primary responsibility for the collection of ad valorem taxes imposed on real property located in Davidson County, Tennessee.

4. As of the date of his death on March 14, 1969, John S. Edney, a resident of Davidson County, Tennessee, owned Metropolitan Tax Map Parcel 68-8 (the "Property") located in Davidson County, the Property being a part of the tract acquired by John S. Edney by deeds from Lottie Gertrude Cato of record in Book 910, page 25, and from Lewis Earl Griffin and wife, Neva Moore Griffin, of record in Book 2640, page 385, Register's Office of Davidson County, Tennessee, the entire tract being described as follows:

* * * *

5. When John S. Edney died on March 14, 1969, he left a Will which was admitted to probate by the Probate Court of Davidson County on March 25, 1969 and was recorded in Will Book 93, page 304. In that Will, John S. Edney devised the Property to his four sisters, Lillian Edney, Leona Edney, Jessylea Edney Smith and Carrie Edney Doty.

6. Lillian Edney died intestate on March 18, 1970 and the Property passed to her heirs, her three sisters.

7. Leona Edney died on September 2, 1976 and her Will was admitted to probate by the Probate Court of Davidson County on August 17, 1977 and was recorded in Will Book 121, page 173. Under Leona Edney's Will, her interest in the property was devised to Plaintiffs equally.

8. Jessylea Edney Smith died intestate on November 7, 1978, and her interest in the Property passed to her children, Plaintiffs Wendell L. Smith, Jr., Beverly Cook, and Linda West, equally.

9. Carrie Edney Doty died on June 12, 1979 and her Will was admitted to probate in Chesterfield County, South Carolina on August 2, 1979 and in Davidson County on March 17, 1980 and was recorded in Will Book 131, page 210. Her Will devised her interest in the Property to Plaintiff Claud Doty.

10. Therefore, after the death of John S. Edney and all of his sisters, title to the Property is held by Plaintiffs as tenants in common, in the following proportions:

Beverly Cook	7/36
Linda West	7/36
Wendell Smith	7/36
Claud Doty	15/36

11. Although after the death of John S. Edney, the names of the owners of the Property were of public record in Davidson County, Tennessee, no change was made by Defendant Clary in the name or address of the person to whom notices and tax statements were sent.

12. In 1978, the Property was included among those turned over by Defendant Ferguson for collection of delinquent taxes. Prior to turning said Property over for collection, Defendant Ferguson failed to ascertain the names of the current owners, as required by T.C.A. 67-1302, even though said names were of public record and were readily attainable.

13. Subsequently, suit was instituted for collection of delinquent property taxes on the Property, but neither Plaintiffs nor their predecessors in title were made parties thereto or notified thereof. The failure to name Plaintiffs or their predecessors was caused by the omissions of Defendants Clary and Ferguson set forth above.

14. On January 25, 1979, the Property was sold to William C. and Araminta McCullough for Five Thousand Seven Hundred Dollars ($5,700), but Plaintiffs did not learn of said sale until March, 1981 when Defendants McCullough first made their purchase known to Plaintiffs.

15. Plaintiffs allege that both they and their predecessors in interest, as the record owners of the Property, were entitled to

notice of said delinquent taxes, were indispensable parties to any action seeking to sell the Property to pay delinquent taxes, and that any decree authorizing sale and any sale pursuant thereto are void. Plaintiffs further allege that they were entitled to notice of said sale, pursuant to T.C.A. Section 67-2018, that they did not receive such notice, and the sale is, therefore, void.

16. Plaintiffs have paid to the Clerk and Master, upon the filing of this cause, the sum of Three Thousand Seven Hundred Ninety Dollars ($3,790) which, together with the amount of proceeds received by the Clerk and Master from said tax sale, Plaintiffs estimate to be the amount required to be paid under T.C.A. Section 67-2024. Plaintiffs hereby tender any further amounts which are shown to be owing pursuant to said Section.

WHEREFORE, Plaintiffs pray as follows:

1. That the Court declare said tax sale of the Property void.

2. That the Court, upon payment to Defendants William C. McCullough and Araminta McCullough of such amounts as may be legally reimbursed to them, divest title out of said Defendants and revest it in Plaintiffs in the proportions set forth in Paragraph 10.

3. That the Court grant Plaintiffs such further relief to which they may be entitled.

BASS, BERRY & SIMS

By: /s/ William W. Berry, Jr.

/s/ George H. Masterson

Attorneys for Plaintiffs
Beverly Ann Cook, Wendell L. Smith, Jr. and Linda West Smith

HALE & HALE

By: /s/ Douglas S. Hale
Attorneys for Plaintiff
Claud Richard Doty

APPENDIX F

TO THE CHANCELLORS HOLDING
THE CHANCERY COURT AT NASHVILLE

NO. 82-121-I

BEVERLY ANN COOK, CLAUD RICHARD DOTY,
WENDELL L. SMITH, JR. AND
LINDA SMITH WEST,
Plaintiffs,

v.

C & N LEASING AND RENTAL CO., INC.;
JIM ED CLARY, PROPERTY ASSESSOR OF THE
METROPOLITAN GOVERNMENT: AND
GLENN FERGUSON, TRUSTEE OF DAVIDSON COUNTY,
Defendants.

COMPLAINT

1. Plaintiffs Wendell L. Smith, Jr., Beverly Ann Cook and Linda Smith West are residents of Davidson County, Tennessee. Plaintiff Claud Doty is a resident of Cheraw, South Carolina.

2. Defendant C & N Leasing and Rental Co., Inc. is a Tennessee corporation with its principal office in Nashville, Tennessee and is the same entity as C & N Lease and Rental Co., Inc., which purchased the property to which reference is hereinafter made.

3. Defendant Jim Ed Clary ("Clary") is the duly elected and acting Property Assessor of the Metropolitan Government of Nashville and Davidson County, Tennessee, and as such, has responsibility for assessing the value of real property and maintaining records of the names and addresses of owners of Davidson County property. Defendant Glenn Ferguson ("Ferguson") is the duly elected and acting Trustee of the

Metropolitan Government of Nashville and Davidson County, Tennessee, and, as such, has primary responsbilility for the collection of ad valorem taxes imposed on real property located in Davidson County, Tennessee.

4. As of the date of his death on March 14, 1969, John S. Edney, a resident of Davidson County, Tennessee, owned Metropolitan Tax Map Parcel 68-45 (the "Property") located in Davidson County, the Property being a part of the tract acquired by John S. Edney by deed from John A. Mefford and wife, Juanita Mefford, of record in Book 1085, page 603, Register's Office of Davidson County, Tennessee, the entire tract being described as follows:

* * *

5. When John S. Edney died on March 14, 1969, he left a Will which was admitted to probate by the Probate Court of Davidson County on March 25, 1969 and was recorded in Will Book 93, page 304. In that Will, John S. Edney devised the Property to his four sisters, Lillian Edney, Leona Edney, Jessylea Edney Smith and Carrie Edney Doty.

6. Lillian Edney died intestate on March 18, 1970 and the Property passed to her heirs, her three sisters.

7. Leona Edney died on September 2, 1976 and her Will was admitted to probate by the Probate Court of Davidson County on August 17, 1977 and was recorded in Will Book 121, page 173. Under Leona Edney's Will, her interest in the Property was devised to Plaintiffs equally.

8. Jessylea Edney Smith died intestate on November 7, 1978, and her interest in the Property passed to her children, Plaintiffs Wendell L. Smith, Jr., Beverly Cook, and Linda West, equally.

9. Carrie Edney Doty died on June 12, 1979 and her Will was admitted to probate in Chesterfield County, South Carolina on August 2, 1979 and in Davidson County on March 17, 1980 and

was recorded in Will Book 131, page 210. Her Will devised her interest in the Property to Plaintiff Claud Doty.

10. Therefore, after the death of John S. Edney and all of his sisters, title to the Property is held by Plaintiffs as tenants in common, in the following proportions:

Beverly Cook	7/36
Linda West	7/36
Wendell Smith	7/36
Claud Doty	15/36

11. Although after the death of John S. Edney, the names of the owners of the Property were of public record in Davidson County, Tennessee, no change was made by Defendant Clary in the name or addresses of the person to whom notices and tax statements were sent.

12. In 1978, the Property was included among those turned over by Defendant Ferguson for collection of delinquent taxes. Prior to turning said Property over for collection, Defendant Ferguson failed to ascertain the names of the current owners, as required by T.C.A. 67-1302, even though said names were of public record and were readily attaintable.

13. Subsequently, suit was instituted for collection of delinquent property taxes on the Property, but neither Plaintiffs nor their predecessors in title were made parties thereto or notified thereof. The failure to name Plaintiffs or their predecessors was caused by the omissions of Defendants Clary and Ferguson set forth above.

14. On January 25, 1979, the Property was sold to C & N Lease and Rental Co., Inc. for Four Thousand One Hundred Dollars ($4,100).

15. Plaintiffs allege that both they and their predecessors in interest, as the record owners of the Property, were entitled to

notice of said delinquent taxes, were indispensable parties to any action seeking to sell the Property to pay delinquent taxes, and that any decree authorizing sale and any sale pursuant thereto are void. Plaintiffs further allege that they were entitled to notice of said sale, pursuant to T.C.A. Section 67-2018, that they did not receive such notice, and the sale is, therefore, void.

16. Plaintiffs have paid to the Clerk and Master, upon the filing of this cause, the sum of Three Thousand Three Hundred Forty Dollars ($3,340) which, together with the amount of proceeds received by the Clerk and Master from said tax sale, Plaintiffs estimate to be the amount required to be paid under T.C.A. Section 67-2024. Plaintiff hereby tender any further amounts which are shown to be owing pursuant to said Section.

WHEREFORE, Plaintiffs pray as follows:

1. That the Court declare said tax sale of the Property void.

2. That the Court, upon payment to Defendant C & N Leasing and Rental Co., Inc. of such amounts as may be legally reimbursed to it, divest title out of said Defendant and revest it in Plaintiffs in the proportions set forth in Paragraph 10.

3. That the Court grant Plaintiffs such further relief to which they may be entitled.

BASS, BERRY & SIMS

By:/s/ William W. Berry, Jr.

/s/ George N. Masterson
Attorneys for Plaintiffs
Beverly Ann Cook,
Wendell L. Smith, Jr.
and Linda West Smith

HALE & HALE

By:/s/ Douglas S. Hale
Attorneys for Plaintiff
Claud Richard Doty

APPENDIX G

IN THE CHANCERY COURT, PART I,
FOR DAVIDSON COUNTY, TENNESSEE

NO. 82-121-I

BEVERLY ANN COOK, ET AL.,
Plaintiffs,

vs.

C & N LEASING AND RENTAL CO., INC., ET AL.,
Defendants.

NO. 82-120-II

BEVERLY ANN COOK, ET AL.,
Plaintiffs,

vs.

WILLIAM C. McCULLOUGH, ET AL.,
Defendants.

MEMORANDUM BRIEF IN OPPOSITION TO MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

Defendants Jim Ed Clary, Property Assessor of Davidson County, and Glenn Ferguson, Trustee of Davidson County, have filed alternative Motions to Dismiss and Motions for Summary Judgment in these causes, which have since been consolidated.

The basis of the Motion to Dismiss is that Defendants Clary and Ferguson are not real parties in interest, and the basis of the Motion for Summary Judgment is that the Complaint fails to state a claim upon which relief can be granted. A Memorandum Brief in support of the Motion to Dismiss and the Motion for Summary Judgment has been filed, and Plaintiffs hereby file

this responsive Brief, which shall discuss the Motion to Dismiss for failure to state a claim first.

This Brief will begin with a brief review of the facts.

* * *

FAILURE TO STATE A CLAIM

The two tax sales which Plaintiff attacks in these causes were conducted pursuant to a Decree of the Chancery Court in the case of *State of Tennessee, etc. v. Delinquent Taxpayers for 1976 Taxes,* Docket No. 78-369-I. The Clerk's records disclose that that suit was filed on March 13, 1978, and that John S. Edney was named as one of the defendants in that suit. At the time the suit was filed, the Probate Court Clerk's records showed that the said John S. Edney was deceased and showed, by virtue of his Will and the Will of Leona Edney which had also been duly probated, that title to his property had passed to Mrs. Wendell Smith, Sr., Carrie Doty, and Plaintiffs. Notwithstanding the fact that the public records disclosed that Plaintiffs, and their predecessors in title, were the owners of the properties formerly owned by John Edney, they were not made parties to said suit; and the Court's file discloses that no attempt was made to serve them with a summons or other process, nor was any attempt made to make them a party to said suit, *even though they were the owners of the property,* and *their ownership was disclosed on the public records in Davidson County,* and it might reasonably be inferred from the existence of several years of delinquent taxes that John Edney was deceased or no longer owned the Properties.

Instead, the Court records disclosed that a summons was issued for John S. Edney, a copy of which is attached to Defendants' Brief, and that said summons was returned "not to be found." Subsequently, publication was issued for John S. Edney in the Nashville Record, and a certified copy of said publication notice is attached hereto as Exhibit B. When no responsive pleading

was filed by John S. Edney, an Order of Sale was entered for the Properties and Notices of said sale were published once in the Nashville Record on December 28, 1978, and listed only John Edney as the property owner. Certified copies of said sales notices are attached hereto as Exhibit C.

Plaintiffs submit that it is basic that persons whose property rights are to be adjudicated in a court of law must be made parties to the court action and that service of process must be issued for them and at least attempted, and Plaintiffs contend that this is especially the case in actions which may result in a deprivation of their property, such as the 1976 delinquent taxpayers suit. As stated by the Tennessee Court of Appeals in the case of *West v. Jackson,* 28 Tenn. App. 102, 186 S.W.2d 915 (1944):

> ". . . This is a fundamental maxim of Equity jurisdiction, and has always been sacredly observed. Indeed, it is a principle founded in natural justice, and of universal application, that no man can be proceeded against in Court without notice. The inherent love of fair play contained in the maxim, Audi alteram partem, has always and everywhere been recongized by all Judges and Courts; and the practice of all tribunals is to render judgment against no one without giving him a chance to be heard in his own behalf. The law delights in giving to every man a day in Court to make his defence. Were the law otherwise no right would be certain, no property safe, no possession secure, fraud would revel in triumph, and trickery be supreme over good faith. No principle of the common law is more sacred than that no man shall be deprived of his property by the judgment of a Court without personal notice that he has been impleaded therein.". . .
>
> Pages 106-107

The facts of the *West* case are also pertinent. There, the Court set aside a tax sale where the taxpayer was not served with process and there was no evidence that process was either issued for

him or served upon him. The facts of this case do not differ in any material manner from those of the *West* case, and this Court should consider the *West* case as controlling upon it.

Defendants Clary and Ferguson argue, in their Brief, that the names of the current owners were not readily ascertainable since Plaintiffs had failed to record their deeds in the Register's Office. The short answer to the Defendants' contention is that title to property is passed both by deed, by Will, and by inheritance, and that title to property cannot simply be acertained by a search of the records of the Register's Office, but must also be ascertained from a search of the records of the Probate Clerk's Office. Not only does a normal title search include a search of the Probate Clerk's Office, it should be readily apparent that a search of these records is required in a case where several years of real property taxes have gone unpaid, increasing the likelihood that the property owner has died.

In addition to the *West* case, it is the rule in Tennessee that publication is not sufficient service of process where the defendant's address could be readily and easily determined and actual notice could be given. *Baggett vs. Baggett,* 541 S.W.2d 407 (S.Ct. 1976). That case actually involved notice to non-residents, such as Plaintiff Doty, or his mother, Carrie Edney Doty, and the Court held that the Due Process Clause of the Fourteenth Amendment required actual notice to be sent in cases where the defendant's address could be readily ascertained. Plaintiffs submit that if actual notice, rather than publication, is required in cases of non-residents whose location can be readily determined, the same is true for residents, and publication will not suffice as service where their names and addresses can be readily ascertained, such as through a search of the Probate Clerk's records. Thus, under the rule of the *Baggett* case, Plaintiffs were entitled to actual notice of the suit to sell their property and, service by publication, had it even named them, was insufficient.

Plaintiffs also contend that the procedure utilized to sell the Properties failed to meet several requirements of the statutory procedure pertaining to the sale of properties for delinquent taxes and, as a result, the tax sales and the tax deeds were void.

* * * *

Finally, the sales notice itself is defective for several reasons. . . . the sale notice was not published in a newspaper of sufficiently broad circulation to perform the function and purpose of the statutorily required sales notice. For these reasons, Plaintiffs maintain that the tax sale was void and that the Court should set aside the tax sale deeds.

Should the Court determine that Plaintiffs were properly notified of the 1976 delinquent taxpayer action and that the sales of the properties pursuant to said action were conducted in compliance with all of the statutory requirements, Plaintiffs maintain that their properties were taken from them and they were deprived thereof in a manner in violation of the Due Process Clause of the Fourteenth Amendment. Plaintiffs have previously demonstrated that, under prevailing Tennessee law, the Due Process Clause requires that actual notice be given where their identities are readily ascertainable. In addition, Plaintiffs maintain that the Due Process Clause of the Fourteenth Amendment requires that the form of notice given to them be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". *Mullane vs. Central Hanover Bank & Trust Company,* 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1949); *Walker vs. Hutchinson,* 352 U.S. 118, 1 L.Ed.2d 178, 77 S.Ct. 200 (1956). The latter case held, similar to the *Baggett* case cited above, that newspaper publication was not adequate notice of a condemnation compensation hearing where the owner's name was known to the city and was on the official records. Thus, under the interpretations of the Due Process Clause by both the Tennessee

and United States Supreme Courts, service by publication was insufficient to comply with Due Process requirements in this case and *actual notice to the property owners is required.* In the *Walker* case, the United States Supreme Court concluded that newspaper publications were rarely effective to inform landowners of proceedings against their property. Of course, the Supreme Court's holding is especially in point when the publication is made in a small legal newspaper of very limited circulation, such as the Nashville Record.

Furthermore, Plaintiffs contend that Section 67-2018 is in violation of the Due Process Clause if it is construed so as not to require that they be given actual notice of the time and place of the tax sale and that they not be named in any publication notice, where their names are readily ascertainable from the public records.

* * * *

Respectfully submitted,

BASS, BERRY & SIMS

By: /s/ William W. Berry, Jr.

By: /s/ George H. Masterson

HALE & HALE

By: /s/ Douglas Hale

APPENDIX H

IN THE CHANCERY COURT
FOR THE STATE OF TENNESSEE
7TH DIVISION
DAVIDSON COUNTY
PART ONE

82-120-II & 82-121-I

BEVERLY ANN COOK, CLAUD RICHARD DOTY, WENDELL L. SMITH, JR., and LINDA SMITH WEST,

vs.

ARMINTA McCULLOUGH, C & N LEASING & RENTAL CO., INC., JIM ED CLARY, Property Assessor of the Metropolitan Government, and GLENN FERGUSON, Trustee of Davidson County,

MEMORANDUM

Introduction

In this case, plaintiffs seek to set aside tax sales of certain property and divest title from defendants to plaintiffs. The defendants in this consolidated action are the purchasers of the property at two separate tax sales, the Tax Assessor and the Trustee for Davidson County, Tennessee. Defendants Clary and Ferguson moved to dismiss the complaint and defendant C & N Leasing & Rental Company, Inc., raised as a special defense the complaint failed to state a claim against it upon which relief could be granted. Since matters outside the pleadings were considered by the Court, the Court treated the motions as motions for summary judgment. Based on a hearing held on May 14, 1982, the record and argument of counsel, the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

(1) Plaintiffs Wendell L. Smith, Jr., Beverly Ann Cook and Linda Smith West are residents of Davidson County, Tennessee. Plaintiff Claud Doty is a resident of Cherau, South Carolina.

(2) Defendant C & N Leasing & Rental Company, Inc., is a Tennessee corporation with its principal office in Nashville, Tennessee and is the same entity as C & N Lease and Rental Co., Inc., which purchased the property to which reference is hereinafter made. Defendant Araminta McCullough is a resident of Davidson County, Tennessee, and is the surviving spouse of William C. McCullough, deceased.

(3) Defendant Jim Ed Clary (Clary) is the duly elected and acting Property Assessor of the Metropolitan Government of Nashville and Davidson County, Tennessee, and as such has responsibility for assessing the value of real property and maintaining records of the names and addresses of owners of Davidson County property. Defendant Glenn Ferguson (Ferguson) is the duly elected and acting Trustee of the Metropolitan Government of Nashville and Davidson County, Tennessee, and as such has primary responsibility for the collection of ad valorem taxes imposed on real property located in Davidson County, Tennessee.

(4) John S. Edney died on March 14, 1969, leaving a Will which was admitted to probate by the Probate Court of Davidson County on March 25, 1969 and was recorded in Will Book 93, page 304. At the date of his death, John S. Edney owned two tracts of land comprising Metropolitan Tax Map Parcel Nos. 68-8 and 68-45 (the "Properties"), said properties being parts of the properties conveyed to John S. Edney by deeds from Lottie Gertrude Cato of record in Book 910, page 25, Lewis Earl Griffin and wife, Neva Moore Griffin, of record in Book 2640, page 385, and by deed from John A. Mefford and wife, Juanita Mefford, of record in Book 1085, page 603, all of

said deeds being recorded in the Register's Office of Davidson County, Tennessee.

(5) In his Will, John S. Edney devised:

> All of the rest, residue and remainder of my estate, whether real, personal or mixed, or whatsoever nature and wheresoever located, . . . in equal shares to my four sisters as follows: Mrs. Claude Doty, Miss Lillian Edney, Miss Leona Edney, and Mrs. Wendell Smith, Sr., share and share alike; and if any one of my said sisters should predecease me, then her said share shall go to her surviving child or children; however, if any one of my sisters predecease me without issue, then her share shall go to the surviving sisters and/or their children.

(6) Lillian Edney died intestate on March 18, 1979 and letters of administration were issued on February 16, 1971. Her property passed to her heirs whose identities are not disclosed in the Letters of Administration.

(7) Leona Edney died on September 2, 1976 and her Will was admitted to probate by the Probate Court of Davidson County on August 17, 1977 and was recorded in Will Book 121, page 173. Under Leona Edney's Will, her interest in the property was devised to the plaintiffs equally:

> All of my estate, real, personal, and mixed, of every nature and wheresoever situated, including lapsed legacies, devises, remainders, reversions, expectancies, income collected during the administration of my estate, proceeds of insurance on my life payable to my estate, and all property of which I have power of testamentary disposition, control or appointment, I give, devise and bequeath to my four nieces and nephews per stirpes share and share alike. My four nieces and nephews are Beverly Ann Cook, Linda Dellwen West, Wendell Lee Smith Jr., all of Nashville, Tennessee, and children of my sister Jessylea Smith; and

Claude Richard Doty of Morristown, Tennessee, son of my sister, Carrie Edney Doty.

If any of the foregoing beneficiaries shall not survive me, I devise the interest which such beneficiary would have received, if living, per stirpes and in fee unto his or her issue who shall be living at the time of my death, if any; and if none, then I give, devise and bequeath his or her interest to the surviving beneficiaries per stirpes.

(8) Mrs. Wendell L. Smith, Sr., died intestate on November 7, 1978 (after the suit to sell this property was filed) and letters of administration were issued to Wendell L. Smith, Jr., Linda Smith West, and Beverly Smith Cook as co-administrators of the State of Jessylea Edney Smith. The letters were issued on December 6, 1978. Her interest in the property passed to her heirs whose identities are not disclosed in the Letters of Administration.

(9) Mrs. Carrie Edney Doty, a resident of South Carolina, died after the property was sold. Her Will was probated in South Carolina and filed for ancillary probate on July 30, 1980, and is recorded in Will Book 131, page 210 in Davidson County, Tennessee. Her Will devised all her property to Plaintiff Claud Richard Doty, Jr.

(10) Taxes for the years 1971 through 1976 were not paid. Suit was filed on March 13, 1978, styled *State of Tennessee, etc. vs. Delinquent Taxpayers for 1976 Taxes,* document number 78-369-I and John S. Edney was named as defendant in that action. At the time the suit was filed, and at all times relevant herein, the records of the Tax Assessor's Office reflected that the owner of the property was John S. Edney. It is undisputed in this action that neither plaintiffs nor their predecessors in title advised the Tax Assessor's Office of their interest in the property. Plaintiffs and their predecessors in title did not register their names and addresses with the Tax Assessor's Office as required by T.C.A. § 67-2018.

(11) A summons was issued for John S. Edney which was returned by the Sheriff "Not to be found in my county" on April 28, 1978. Thereafter, an order of publication was entered on August 23, 1978, which order directed that publication be issued for John S. Edney.

(12) The publication was published in the *NASHVILLE RECORD* for four consecutive weeks beginning September 7, 1978. No answer was filed and a default judgment was entered. An order of sale was entered and notices of the sale were published in the *NASHVILLE RECORD* on December 28, 1978.

(13) The properties were sold on January 25, 1979, and Parcel 68-8 was sold to William C. McCullough and wife, Araminta McCullough, for $3,790.00. (Title has subsequently passed to Araminta McCullough by right of survivorship). Parcel 68-45 was sold to defendant C & N Leasing & Rental Co., Inc., for the sum of $4,100.00. Thereafter the sale was confirmed by order of this Court and the Clerk & Master executed his deeds to the purchaser.

(14) This action was filed on January 21, 1982. Plaintiffs have paid to the Clerk & Master, upon the filings of these causes, the sum of $3,790.00, with respect to the property sold to defendant McCullough, and the sum of $3,340.00, with respect to the property sold to defendant C & N Leasing & Rental Co., Inc., which amounts, together with the proceeds received by the Clerk & Master from the tax sales of the properties, plaintiffs estimated to be the amount required to be paid under T.C.A. § 67-2024. Plaintiffs also tendered any further amounts shown to be owing pursuant to said section.

(15) A review of the pleadings reflect that plaintiffs allege that plaintiffs and their predecessors in interest were entitled to notice of the delinquent taxes, were indispensable parties to any action seeking to sell the property for non-payment of taxes, and that any decree authorizing the sale, and any sale pursuant

thereto, is void. Plaintiffs further contend that they were entitled to notice of the sale and having failed to receive the notice, the sale is void.

(16) The pleadings do not challenge the validity of the Sheriff's return or the technical aspects of the sale. The pleadings do not challenge the constitutionality of the statutory scheme by which taxes are collected.

(17) It is undisputed that neither plaintiffs nor their predecessors in title (with the exception of John S. Edney) were listed as delinquent on taxes or were made parties to the 1976 taxpayers suit. No service of process was issued and no publication was made for plaintiffs or their predecessors in title, other than that directed to John S. Edney.

CONCLUSIONS OF LAW

(1) T.C.A. § 67-2018 requires that property owners advise the taxing authorities of ownership of taxable property in order that the Assessor may properly perform his functions. This is mandated by T.C.A. § 67-2018. The police powers of the State to levy and collect taxes are not being challenged in this action.

(2) There is no claimed irregularity in the proceedings surrounding the filing of the complaint to sell the property, the return of the Sheriff, the order of publication, the entry of default, and the order authorizing the sale of the property. In addition, there is no challenge to the validity of the sale or the order confirming it. *Rast vs. Terry,* 532 S.W.2d 552 (Tenn. 1976). In the absence of some affirmative proof to the contrary, there is a presumption of correctness of all of these proceedings. *Gibson's Suits in Chancery,* Grownover, 5th Ed. § 607. Plaintiffs' challenge is directed specifically to the lack of notice to plaintiff of the various proceedings, and the failure of the public officials to join them as parties to the tax sale.

(3) In the recent case of *Morris vs. Beard, et al.,* an unreported opinion of the Court of Appeals for the Eastern Sec-

tion (February 12, 1982) that Court was confronted with a very similar factual situation and interpreted T.C.A. § 67-2018 to create an obligation upon the currect property owners to register their names and addresses with the Tax Assessor and as a result of their failure, the Court stated "We don't think the plaintiffs can complain of not having received notice." Opinion at 5.

(4) The Court finds that no duty is imposed upon either the Tax Assessor nor upon the Metro Trustee to engage in complete searches of all public records to determine the true ownership of property.

(5) Plaintiffs claim that they are indispensable parties to any action to sell the real estate for delinquent taxes. This argument is apparently premised upon the notion that as the devisees of John S. Edney they should have been parties to the action. Under T.C.A. § 67-1804 tax proceedings are in rem actions. The filing of such suit and notice to the owner of record and subsequent publication are all that is necessary to allow the action to proceed. In in rem actions "it is usually held that all persons having an interest in the property are deemed to have constructive notice of the claim for taxes." *State vs. Benner,* 182 Tenn. 395, 187 S.W.2d 609, 610 (1940). Accordingly, since plaintiffs are deemed to have had constructive notice of the claim and as long as the technical requirements of attempted service and publication are regular, plaintiffs cannot complain of the failure to be joined as parties, since they had constructive notice of the suits.

(6) Publication in the *Nashville Record* constitutes adequate notice to all parties.[1]

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[1] Conclusion 6 was added by Order dated November 11, 1982.

(7) Accordingly, based upon the pleadings presently before the Court, the motions to dismiss, and supporting exhibits, the Court is of the opinion that the complaint fails to state a claim upon which any relief can be granted and these consolidated actions should be dismissed in their entirety.

/s/ Irvin H. Kilcrease, Jr.,
Chancellor

September 9, 1982

APPENDIX I

IN THE SUPREME COURT OF TENNESSEE[2]

BEVERLY ANN COOK, CLAUD RICHARD DOTY, WENDELL L. SMITH, JR., and LINDA SMITH WEST,
Plaintiffs-Appellants,

vs.

ARAMINTA McCULLOUGH; C & N LEASING & RENTAL CO., INC.; JIM ED CLARY, Property Assessor of the Metropolitan Government; and BILL GARRETT, Trustee of Davison County,
Defendants-Appellees.

NO. 82-71-I

DIRECT APPEAL FROM DAVIDSON EQUITY

BRIEF OF PLAINTIFFS-APPELLANTS

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This Appeal presents this Court with the following issues for review:

(1) Whether the decree authorizing the tax sale of properties in which Plaintiffs formerly owned an interest is valid when neither Plaintiffs nor any of the other owners were parties to the delinquent taxpayers' suit or were served with process, even though their ownership of the properties was a matter of public record?

(2) Whether Plaintiffs' property can constitutionally be sold to pay delinquent taxes when Plaintiffs, who are the

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[2] After the appeal was filed and briefed, it was transferred to the Tennessee Court of Appeals, and the briefs previously filed with the Tennessee Supreme Court were used for the purpose of that appeal.

owners as shown by the public records, are not made parties to and are not served with process in the delinquent taxpayers action?

* * * *

ARGUMENT

I. THE DECREES ORDERING PLAINTIFFS' PROPERTIES TO BE SOLD FOR DELINQUENT TAXES ARE VOID BECAUSE PLAINTIFFS WERE NOT PROPERLY BEFORE THE COURT BY ACTUAL OR VALID SERVICE BY PUBLICATION AND WERE NOT PARTIES TO THE DELINQUENT TAXPAYERS SUIT.

The consolidated suits instituted by Plaintiffs-Appellants are actions seeking to set aside the January 25, 1979 tax sales of the Properties to Defendants-Appellees McCullough and C & N pursuant to decrees entered in the case of *State of Tennessee, etc. v. Delinquent Taxpayers for 1976 Taxes,* Davidson County Chancery Docket No. 78-369-I, and to declare void the decrees authorizing said sales. Plaintiffs alleged that although they were among the record owners of the property at the time the suit was instituted, neither they nor any of the other owners were made parties Defendant; that no attempt was made to serve any of the record owners with process or make them parties by publication; that neither they nor the other owners had notice of the suits even though they were indispensable parties; and that the decrees and the subsequent tax sales of their properties were therefore void.

* * * *

A. If a Taxpayer is not a Party to and is not Properly Before the Court by Actual Service of Process or Valid Service by Publication, a Decree Ordering the Tax Sale of His Property is a Nullity and the Tax Deed Executed Pursuant Thereto is Void.

Plaintiffs maintain that it is basic to the validity of decrees entered in delinquent taxpayers' actions that the taxpayer, whose property is to be sold, be a party to that action and be properly before the court by actual service of process or valid service by publication. If these prerequisites are not met, the tax sale decree and any resulting tax sale are nullities and may be assailed at any time. A review of Tennessee cases demonstrates that the decree in a delinquent taxpayers action and the subsequent tax deed are nullities where the record owner or owners of the property are not parties to that action and are not properly before the court by virtue of actual service of process or valid service by publication. This rule was developed at an early date and has been carried through consistently until the present.

In the early case of *Bush's Heirs v. Williams, et al.*, 3 Cooke (3 Tenn.) 360 (1813), the Court dismissed an ejectment action to recover property formerly owned by the heirs of William Bush and acquired by the plaintiff at a tax sale on the ground that the heirs owning the property were not named and not made parties to the tax proceedings. The Court held that the decree ordering the property sale was void because "[n]o man can be bound by proceedings to which he is not a party."

Later, in the case of *Armstrong v. Exum, et al.*, 52 S.W. 1024 (Tenn.Ch.App. 1899), the court invalidated the tax sale of property under a decree in a delinquent taxpayers' action because the record owner of the property was not made a party to that proceeding. The facts in this case are not materially different from those in the case before this Court. There, the subject property was purchased by a Mr. Preston in March, 1889 and Preston's deed was promptly recorded. Later that year, Preston sold the property to J. H. Pearce and delivered a deed to him which was never recorded. The following year, 1890, Pearce sold the property to the Plaintiff and a co-tenant, named Parrott, whose interest the Plaintiff acquired in 1891. Both of Plaintiff's deeds were recorded promptly. When the delinquent taxpayers' action was instituted in September, 1893, only

Preston was made a party, even though the Plaintiff's deeds were already recorded. The Court held the tax sale decree void and noted that this tax sale deprived the taxpayer of his property without a day in court or a hearing.

Another case addressing a similar fact pattern is *Strother v. Reilly,* 105 Tenn. 48, 58 S.W. 332 (1900). There the Court invalidated the April, 1885 tax sale of property formerly owned by Austin Bull. The delinquent taxpayers' action was originally instituted in 1874, and was revived by an amended bill and consolidated with another such action in 1883, without naming any of the heirs of Austin Bull who had died in the interim. The Court held the tax sale decree invalid because these heirs were not made parties to the proceeding and invalidated the tax deed upon which the defendant relied for his title.

In *West et ux. v. Jackson et ux.,* 28 Tenn.App. 102, 186 S.W.2d 915 (1944), *cert. den.* 1945, the Court held that the decree which ordered a tax sale of the complainant's property was void. The delinquent taxpayers' action had been filed in 1934 against the complainant, but there was no evidence that process was either issued for or served upon him. The Court construed a portion of Chapter 77 of the 1923 Public Acts (now codified in T.C.A. Section 67-2012) which provided that these proceedings will be conducted according to the rules of Chancery. The Court held that this meant that the defendant taxpayer must be before the court by actual or constructive service of process, that notice of the action was essential, and that the decree was void where these prerequisites were not met. The Court quoted Chancellor Gibson:

> . . . This is a fundamental maxim of Equity jurisdiction, and has always been sacredly observed. Indeed, it is a principle founded in natural justice, and of universal application, that no man can be proceeded against in Court without notice. The inherent love of fair play contained in the maxim, Audi alteram partem, has always and every-

> where been recognized by all Judges and Courts; and the practice of all tribunals is to render judgment against no one without giving him a chance to be heard in his own behalf. The law delights in giving to every man a day in Court to make his defense. Were the law otherwise no right would be certain, no property safe, no possession secure, fraud would revel in triumph, and trickery be supreme over good faith. No principle of the common law is more sacred than that no man shall be deprived of his property by the judgment of a Court without personal notice that he has been impleaded therein.

Also, the Court in *Esch v. Wilcox,* 181 Tenn. 165, 178 S.W.2d 770 (1944), stated that the taxpayer must receive notice of the delinquent taxpayers' action which "is of such character as to make the taxpayer aware of the proceedings and give him an opportunity to pay the taxes and make his defenses."

Similarly, in the case of *St. Clair v. Lawrence,* 31 Tenn.App. 231, 213 S.W.2d 809 (1948), *cert. den.,* the Court was asked to determine the validity of a 1945 tax sale deed under which the complainant claimed title. The deed was executed pursuant to a 1940 order of sale which had been entered in a delinquent taxpayers action filed in 1925 against J. Q. Ketner, the former property owner. The evidence was that Mr. Ketner had sold the property to L. L. Lawrence in 1923 and died later that year. Mr. Lawrence owned the property from 1923 until 1945 when he sold it to his grandson, the defendant. The Court stated that the tax deed was void because the Court, in the delinquent taxpayers action, even though having jurisdiction of the property, never had jurisdiction of the interest of L. L. Lawrence, the property owner, who was not made a party and had no notice of the action.

In a more recent case, *Naylor v. Billington,* 213 Tenn. 614, 378 S.W.2d 737 (1964), the Tennessee Supreme Court declared void the chancery decree ordering that the property of E. W.

Naylor and Harold Moore be sold for delinquent taxes because they were not personally served with process and there was no valid service upon them by publication. The Court reviewed a number of Tennessee cases, dealing with the requirements of delinquent taxpayers' proceedings, and quoted, with approval, the following statement from the *West* case (28 Tenn.App. 102 at 106, 186 S.W.2d 915 at 917):

> It is evident that although a proceeding in rem, the procedure is the same as in any other Chancery cause - the defendant must be before the court by actual or constructive service of process. If this is not done, there would be a mere confiscation of property.
>
> *****
>
> Where the court has jurisdiction over the subject matter by actual or constructive notice to the taxpayer, then all questions must be settled in that cause. . ., but *notice is essential, . . . If no notice the decree is void, . . . Tennessee Marble & Brick Co. v. Young,* 179 Tenn. 116, 163 S.W.2d 71 (1942).
>
> * * * *

More recent cases, such as *Rast v. Terry,* 532 S.W.2d 552 (Sup.Ct. 1976) and *Marlowe v. Kingdom Hall of Jehovah's Witnesses,* 541 S.W.2d 121 (Sup.Ct. 1976) have reaffirmed these rules. In both cases, the Court quoted with approval the requirements of the *Naylor* case that the taxpayer must be before the court by actual or constructive service of process in order for a valid decree to be entered. In *Rast,* the Court said "*[w]here the taxpayer is not properly before the court the resulting decree and sale is a nullity* as to him and may be assailed at any time." (Emphasis supplied.)

Thus, actions to sell property to satisfy delinquent property taxes are to be conducted according to the rules of chancery (T.C.A. Section 67-2012(b)); the property owner whose proper-

ty is to be sold to pay delinquent taxes must be before the court by actual service of process or service by valid publication, even though the proceeding is an in rem one. When these prerequisites are not fulfilled, the decree ordering the tax sale is void; any deed executed pursuant to said decree is a nullity; and both the decree and the deed may be attacked at any time.

* * * *

The factual situation before this Court does not differ in any material manner from the fact patterns of many of the cases referred to above, especially the *Armstrong* and *St. Clair* cases. In this case, the former property owner who was named as a defendant and upon whom service was attempted, had died, and title to the property had been devised to the Plaintiffs by Wills which were duly probated at the time the delinquent taxpayers action was instituted. Even though Plaintiffs were among the record owners of the property, *it is undisputed that only John S. Edney was named as a defendant to the delinquent taxpayers action; that the record owners were not made parties; and that there was no attempt to serve any of the record owners of the property, including Plaintiffs, with either actual or constructive process.* Under the rules developed in the cases cited above, the decrees authorizing the sale of the Properties are void and the tax sale deeds purporting to convey title to Defendants McCullough and C & N are nullities.

* * * *

The rule of law adopted by the Chancellor may be stated in this manner: there is no necessity that the record owners of property be made parties to, be served with process, or otherwise be notified that a delinquent taxpayers action has been instituted seeking to sell their property unless they can affirmatively show that they have notified the Assessor of their ownership interest. Plaintiffs respectfully submit that this interpretation is not supported by the language of Section 67-2018, the other statutory

provisions governing delinquent taxpayers actions, or the legislative history of those statutes.

* * * *

In summary, Plaintiffs respectfully submit that the portions of T.C.A. Section 67-2018 relied upon by Defendants cannot reasonably be interpreted as changing the well-established requirement that property owners must be before the Court by actual service of process or valid service by publication before a valid decree can be entered subjecting their property to sale to satisfy delinquent tax liabilities.

* * * *

Therefore, Plaintiffs respectfully submit that before a taxpayer's property may be sold to satisfy delinquent taxes, he, or at least the owners of the properties as shown by the public records, must be parties to the delinquent taxpayers action and must be before the Court either by actual service of process or valid service by publication, and the resulting tax sale decree is void and any deed executed pursuant thereto is a nullity, if these prerequisites are not fulfilled. Plaintiffs further submit that the facts of this case fall squarely within these established rules.

* * * *

B. The Tennessee Procedure Governing Delinquent Taxpayers Actions, Including Section 67-2018, Violates the Due Process Clause of the Fourteenth Amendment if, Properly Interpreted, it Permits the Sale of a Taxpayer's Property where that Taxpayer is the Record Owner of the Property and is Neither Served with Process nor Made a Party to the Delinquent Taxpayers Proceeding.

Plaintiffs also maintain that T.C.A. Section 67-2018 should not be interpreted as Defendants contend because this interpretation renders the procedure governing Tennessee delinquent

taxpayers actions in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Plaintiffs raised this constitutional argument in their response to Defendant's Motion for Summary Judgment and again in oral argument before the Chancellor, offering to amend the Complaint to include this contention. While the Chancellor did not, as requested, enter any specific conclusion of law with respect to this contention, Plaintiffs' contention was implicitly rejected by the Court's holding that the failure of the Plaintiffs to register their names with the Assessor's Office obviated the necessity of making them parties to the delinquent taxpayers action.

If Section 67-2018 is interpreted as Defendants contend, there is no necessity of any service upon or notice to property owners, regardless whether they have recorded their deeds or probated the Wills under which they have received the property, unless they can also affirmatively demonstrate that they have notified the Assessor of their ownership interest. Plaintiffs respectfully submit that this interpretation violates the Due Process Clause of the Fourteenth Amendment and the notice requirements and rationale of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). In that case, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment required that the form of notice given to parties in in rem actions be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". 339 U.S. 306 at 314.

Plaintiffs are well aware that his court in the *Marlowe* case refused to apply the *Mullane* rationale to delinquent taxpayers' actions, holding that constructive notice was sufficient in these actions, even though the higher courts in other jurisdictions have done so. See *Pierce v. Board of County Comm'rs,* 200 Kan. 74, 434 P.2d 858 (1967); *Laz v. Southwestern Land Co.*, 97 Ariz. 69, 397 P.2d 52 (1964); and *Dow v. State,* 396 Mich.

192, 240 N.W.2d 450 (1976). However, in the *Marlowe* case, the Plaintiffs were maintaining that the Due Process Clause, as interpreted by the Supreme Court in *Mullane,* required *actual* notice, as opposed to notice by publication (which in that case was duly and properly made). In contrast, under the Chancellor's interpretation, neither actual service *nor constructive service by publication* would be required; *no notice or service would be required at all* unless the taxpayer had notified the Assessor of his ownership. In short, there will be no notice, much less any notice which could reasonably be expected to apprise property owners of delinquent taxpayers actions involving their properties. Accordingly, the Chancellor's holding removes any requirement that either the type of notice required by the United States Supreme Court in *Mullane,* or the type of notice required by this Court in *Marlowe,* be given. Plaintiffs respectfully submit that this interpretation renders the Tennessee procedure for collection of delinquent taxes in violation of the Fourteenth Amendment to the United States Constitution and should therefore be rejected by this Court.

* * * *

Respectfully submitted,

BASS, BERRY & SIMS

By: /s/ William W. Berry, Jr.

HALE & HALE

By: /s/ Douglas S. Hale

APPENDIX J

IN THE CHANCERY COURT
FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT
DAVIDSON COUNTY, PART ONE

NOS. 82-121-I
82-120-I

BEVERLY ANN COOK, ET AL.,

VS.

ARAMINTA McCULLOUGH ET AL.

MEMORANDUM

These consolidated actions are before this Court on remand from the Tennessee Supreme Court, for an evidentiary hearing upon the adequacy of publication in *The Nashville Record* of notice of property tax sales.

History of Proceedings

1. On January 21, 1982, the plaintiffs, heirs of John S. Edney, deceased, and record owner of the subject property, filed their complaints seeking to set aside tax deeds acquired by defendants, William C. and Araminta McCullough, and C & N Leasing and Rental Company, Inc., as a result of a tax sale to satisfy delinquent taxes upon the subject properties.

2. On September 22, 1982, this Court granted defendants' motion for summary judgment, thereby dismissing plaintiffs' complaint on the ground that plaintiffs' failure to notify the tax assessor's office of their ownership pursuant to T.C.A. § 67-2018 (1983), barred their claim of lack of notice of the delinquent assessments or the tax suit.

3. By order entered November 11, 1982, the findings of fact were amended to include the conclusion of law that publication

in *The Nashville Record* constituted adequate notice of all parties.

4. On appeal, the Tennessee Court of Appeals affirmed the order of this Court granting defendants' motions for summary judgment and dismissing plaintiffs' complaints. *Cook, et al. v. McCullough, et al.*, No. 83-207-II (Tenn. Ct. App., October 18, 1983). The Court held that under T.C.A. § 67-2018, which deals with notice to the present owner, the burden is on the present property owner to register his name and address with the tax assessor so that notice may be provided to him or her in the event of a sale. The Court further held that since plaintiffs' interest was not on record with the tax assessor's office as required by the statute, they were not entitled to any more notice than that given them by publication in the newspaper.

5. The Supreme Court granted plaintiffs' application for permission to appeal only the issue of whether this Court erred in holding that the publication of notice of the tax sale in *The Nashville Record* was adequate notice to plaintiffs when there was no evidence in the record on that issue and without permitting the introduction of such evidence in a trial on the merits. The Supreme Court concluded that this Court erred in that regard and remanded the issue to this Court for an evidentiary hearing. *Cook, et al. v. McCullough,* No. 84-27-I (Tenn., November 19, 1984).

6. On remand, Multimedia, Inc. d/b/a *The Nashville Record* was allowed by agreed order to intervene as a party defendant.

7. On March 14, 1986, this Court denied plaintiffs' motion to amend their complaint to allege that T.C.A. §§ 67-2502 and 67-2515 violated their due process rights under the federal and state constitutions, by permitting a tax sale of their property without joining them as parties to the suit or otherwise notifying them, except by publication. This Court held that plaintiffs' motion to amend their pleadings was barred under the doctrine of the law of the case.

8. The Court of Appeals granted plaintiffs' application for extraordinary relief from this Court's order of March 14, 1986, denying plaintiffs' motion to amend their complaint. Thereafter, the Court of Appeals affirmed this Court's decision denying plaintiffs' motion to amend their complaint. *Cook, et al. v. McCullough, et al.*, 735 S.W.2d 464 (Tenn. 1987).

9. On December 14, 1987, this Court heard plaintiffs' motion for summary judgment alleging that the tax notices did not contain an adequate or concise description of the properties and did not contain the amount of the judgment for delinquent taxes. By order entered December 21, 1987, this Court ruled that factual issues were still pending in this litigation and that the issues raised by the motion for summary judgment were outside the limited scope of the Supreme Court's order of remand and, therefore, contrary to the law of the case.

10. Before filing their suits on January 21, 1982, plaintiffs paid to the Clerk and Master all sums due with respect to each parcel of land, pursuant to T.C.A. §67-2024 (now § 67-5-2504).

Findings of Fact

1. The plaintiffs are the eventual heirs of John S. Edney. John S. Edney died a resident of Davidson County on March 14, 1969. He devised the properties in question, parcel 68-8 containing 24.2 acres, and parcel 68-45 containing 29.38 acres, to his four sisters who are now deceased. The plaintiffs are the heirs of the four sisters. When the tax sale was held, plaintiffs Cook, West and Smith were residents of Davidson County and plaintiff Doty resided in Cheraw, South Carolina.

2. John S. Edney was the only owner of record of the properties. After he died no property taxes were paid on the properties. The plaintiffs, nor their predecessors in title, registered their names and addresses with the tax assessor of Davidson County as required by T.C.A. § 67-2018 (now §67-5-2502).

3. Taxes for the years 1971 through 1976 were not paid. Suit was filed on March 13, 1978, styled *State of Tennessee, etc. v. Delinquent Taxpayers for 1976 Taxes,* No. 78-369-I, naming John S. Edney as defendant.

4. A summons was issued for John S. Edney which was returned by the sheriff "not to be found in my county" on April 28, 1978. Thereafter, an order of publication was entered on August 23, 1978, which directed that publication be issued for John S. Edney.

5. The publication was published in *The Nashville Record* for four consecutive weeks beginning on September 7, 1978. No answer was filed, so a default judgment was entered. An order of sale was entered and notice of the sale was published in *The Nashville Record,* dated December 28, 1978. (Ex. Nos. 2 or 8)

6. The properties were sold on January 25, 1979. There were approximately 30 to 50 people present for the sale. Parcel 68-8 was sold to defendants William C. McCullough (no longer a party) and his wife, Araminta McCullough for the sum of $3,790. Parcel 68-45 was sold to defendant C & N Leasing and Rental Co., Inc. for the sum of $4,100.

7. *The Nashville Record* was first published on January 31, 1936. It is a member of the Tennessee Press Association, which requires it to have a second class mailing permit and to be a newspaper of general circulation. It is also a member of the National Newspaper Association.

8. *The Nashville Record* is a tabloid newspaper published weekly. The content of the issue (Ex. Nos. 2 or 8) in question is composed of business news, an editorial, local, state and national news, public notices, which include real estate transactions, motion dockets of the courts of Nashville, Davidson County, bankruptcies, new lawsuits filed in the courts of Nashville, Davidson County, marriages, divorces, and other information of general interest.

9. During the annual period ending September 30, 1979, the paid weekly circulation of *The Nashville Record* was 937 copies with 757 copies sold by paid annual subscriptions. Other copies were sold over-the-counter at the newspaper's office.

10. Dr. Bernard Kelley Leiter, Dean of the College of Communcation at the University of Tennessee at Knoxville, testified on behalf of the defendants. Dr. Leiter has also been Professor of Journalism for 22 years. He examined the December 28, 1978 issue of *The Nashville Record* and its subscriber's list, which was a "broad group." He opined that *The Nashville Record* was a newspaper of general circulation and that it provides an economical means for publishing notices to the public.

11. The plaintiffs testified to the effect that they were not familiar with *The Nashville Record.*

Conclusions of Law

I. Whether publication of a tax sale notice in The Nashville Record satisfied the requirements of T.C.A. § 67-2018 (now codified in T.C.A. § 67-5-2502)?

T.C.A. § 67-2018 provided as follows:

> Advertisement of sale — Notice to present owner. — In the event of a sale under a decree of the court, the property shall be advertised in one (1) sale notice, which notice shall set out the names of the owners of the different tracts or parcels of land and a concise description of the property and the amount of judgment against each defendant. Said advertisement may be by publication in a newspaper as required by law, or by printed handbills as the courts may decree.
>
> However, notice of the sale shall be sent by registered return receipt mail to the last known address of the present owner of any real property if the delinquent taxes for which the sale is to be conducted were assessed on the real

> property when owned by a prior owner of the real property.
>
> The term 'last known address of the present owner' shall be defined as the address of the owner of said property on record in the tax assessor's office of each county.
>
> It shall be the responsibility of the property owner to register his name and address with the tax assessor of the county in which the land lies.
>
> The property owner shall bear the cost of the registered return receipt mail and if the said registered mail is not claimed within twenty (20) days following the mailing, the county may proceed as though the notice had been received.

The plaintiffs contend that *The Nashville Record* is not a "newspaper of general circulation" as that term was defined in T.C.A. § 2-104(12) (now T.C.A. §2-1-104(12), which states as follows:

> 'Newspaper of general circulation' means a publication bearing a title or name, regularly issued at least as frequently as once a week for a definite price, having a second class mailing privilege, being not less than four (4) pages, published continuously during the immediately preceding one year period, which is published for the dissemination of news of general interest and is circulated generally in the political subdivision in which it is published and in which notice is to be given. A newspaper which is not engaged in the distribution of news of general interest to the public, but which is primarily engaged in the distribution of news of interest to a particular group of citizens, is not a 'newspaper of general circulation.'

The defendants contend that *The Nashville Record* is a newspaper of general circulation and that the publication of the tax sale was made pursuant to T.C.A. § 67-2018.

The Tennessee Supreme Court held in an unpublished opinion, *Record Publishing Company v. Smith* (decided March 24, 1937) that *The Nashville Record* was a proper newspaper for publication of legal notices required by law. The Court went on to point out that "[p]ublication in 'a newspaper' is broadly called for. This, of course, must be construed to contemplate a regular, bona fide, publication, carrying news of interest to the public and published periodically at stated intervals."

Newspapers similar to *The Nashville Record* have been held by the courts to be publications sufficient for the publication of legal notices as required by law. *Moore v. Memphis,* 184 Tenn. 92, 195 S.W.2d 623 (1946), *Pope v. Craft,* 1 Tenn. App. 356 (1925).

In *Shoppers Guide Publishing Company, Inc. v. Woods,* 547 S.W.2d 561, 563 (Tenn. 1977), the Supreme Court held that the minimum criteria set forth by the Commissioner of Revenue for a publication to be considered a newspaper so as to be exempt from the payment of sales and use taxes, are in accord with the generally accepted usage of the term "newspaper." *See Pope v. Craft, supra.* These criteria are as follows:

> b. in order to constitute a newspaper, the publication must contain at least the following elements:
>
> (1) It must be published at stated short intervals (usually daily or weekly).
>
> (2) It must not, when its successive issues are put together, constitute a book.
>
> (3) It must be intended for circulation among the general public.
>
> (4) It must contain matters of general interest and reports of current events.
>
> c. Notwithstanding the fact that the publication may be devoted primarily to matters of specialized interest, such as

> legal, mercantile, political, religious or sporting matters, if, in addition to the special interest it serves, the alleged newspaper contains general news of the day, information of current events, and news of importance and of current interest to the general public, it is entitled to be classed as a newspaper.

The evidence of record persuades the Court to conclude that *The Nashville Record* is a newspaper of general circulation and that publication of tax sale notices therein satisfies the requirements of T.C.A. § 67-2018 (now codified in T.C.A. §67-5-2502).

II. Whether publication in The Nashville Record was constitutionally adequate as a matter of Due Process?

Plaintiffs contend that regardless of whether *The Nashville Record* was an appropriate publication for the publishing of the tax sale notice, that the Due Process Clause of the Fourteenth Amendment of the United States Constitution required that actual notice be given to the owners of all property interest in the property being sold for delinquent taxes, if the name and address of those parties can be reasonably ascertained.

This issue has been settled by T.C.A. §67-2018 which set forth who is entitled to notice of the tax sale and the opinion of the Court of Appeals as affirmed by the Supreme Court which stated in pertinent part as follows:

> The action to sell real estate for delinquent taxes is an action in rem. T.C.A. § 67-1804. Although persons having an interest in property which is the subject of an in rem proceeding are entitled to notice, the notice required is 'the best notice possible under the circumstances.' *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 Sc.Ct. 652, 94 L.Ed. 865 (1950); *Baggett v. Baggett*, 541 S.W.2d 407 (Tenn. 1976). In this case, since the appellants' interest was not on record in the tax assessor's of-

fice as required by the statute, they were not entitled to any more notice than that given them by publication in the newspaper.

It is undisputed that plaintiffs did not register their names and addresses with the tax assessor. Therefore, as the Court of Appeals has held, plaintiffs were not entitled to any more notice than was given them by publication. Further, the plaintiffs have failed to adequately prove that publication of tax sales in *The Nashville Record* is constitutionally inadequate when compared to publication in some other newspaper.

It is the conclusion of the Court that publication of the tax sales in *The Nashville Record* was constitutionally adequate under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The Court finds it unnecessary to address other claims or defenses raised by the parties.

/s/ IRVIN H. KILCREASE, JR.
CHANCELLOR

February 24, 1989

IN THE CHANCERY COURT
FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT
DAVIDSON COUNTY
PART I

Nos. 82-121-I
and 82-120-I

BEVERLY ANN COOK, CLAUD RICHARD DOTY,
WENDELL L. SMITH, JR., and LINDA SMITH WEST,
Plaintiffs,

v.

ARAMINTA McCULLOUGH,
C & N LEASING AND RENTAL CO., INC.,
JIM CLARY, Property Assesso
of the Metropolitan Government,
BILL GARRETT, Metropolitan Trustee,
MULTIMEDIA, INC., d/b/a *The Nashville Record,*
Defendants.

FINAL JUDGMENT

These consolidated causes came on to be heard before the Honorable Irvin H. Kilcrease, Jr., Chancellor of the Chancery Court for Davidson County, Tennessee, Part I, on the 22nd day of February, 1988 on remand from the Tennessee Supreme Court for an evidentiary hearing upon the adequacy of publication in *The Nashville Record* of notice of property tax sales. Based upon the pleadings of the parties, testimony of witnesses, exhibits admitted into evidence, briefs and arguments of counsel and the record as a whole, this Court finds that *The Nashville Record* is a newspaper of general circulation and that publication of tax sale notices therein satisfies the requirements of T.C.A. §67-2018 (now codified in T.C.A. §67-5-2502). This Court finds further that publication of the tax sales notices in these cases in *The Nashville Record* was constitutionally ade-

quate under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Accordingly, the Complaints of the Plaintiffs should be dismissed, for all the reasons set forth in the Memorandum of this Court entered February 24, 1989 which is incorporated herein by reference.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that:

1. *The Nashville Record* is a newspaper of general circulation and that publication of tax sale notices therein satisfies the requirements of T.C.A.§67-2018 (now codified in T.C.A.§67-5-2502).

2. Publication of the tax sale notices in these cases in *The Nashville Record* was constitutionally adequate under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

3. The Complaints of the Plaintiffs be and the same are hereby dismissed.

4. Upon payment of costs, all sums, plus accrued interest, if any, heretofore paid to the Clerk and Master by the Plaintiffs shall be returned to the Plaintiffs.

5. Costs are taxed to the Plaintiffs, for which execution may issue if necessary.

ENTER this 14th day of March, 1989.

/s/ IRVIN H. KILCREASE, JR.
CHANCELLOR

APPENDIX K

U.S. CONSTITUTION
FOURTEENTH AMENDMENT

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

TENNESSEE CODE ANNOTATED

67-2003. Filing of suits — Prosecution. — The attorney designated by the trustee with the approval of the county judge, shall after February 1, and not later than April 1, file suits in the circuit or chancery courts of the county for the collection of delinquent land taxes due the state, county, and municipality, as well as the interest, penalties, and costs attached to and a part of such taxes, which taxes, interest, penalties, the costs are declared a lien upon the land; and, for the enforcement of this lien, said suits shall be brought in the name of the state, in its own behalf and for the use and benefit of the county, and of any municipality certifying the lists of delinquent taxes. The bill shall be in substance and form as other bills of complaint for the enforcement of liens and shall include not less than twenty-five (25) defendants, if that number are delinquent; and the bill (one bill) may be filed against and contain the names of all the delinquent taxpayers in the county, and the fact that the bill contains the names of more than one (1) defendant shall not be considered by the court multifarious, or a misjoinder of parties.

Suits for the collection of delinquent taxes are to be prosecuted to a conclusion as soon as practicable and for this purpose proceedings in respect thereto are to be accorded priority by the court. [Acts 1923, ch. 77, § 8; Shan. Supp., § 913b17; Code 1932, § 1591; C. Supp. 1950, § 1591; Acts 1973, ch. 296, § 1; 1975, ch. 32, § 2.]

* * * * *

67-2012. Prosecution of suit — Sale of land. — All such suits, whether brought in the chancery court or circuit court shall be prosecuted according to the rules of procedure of courts of chancery; and all lands impressed with the lien for taxes, interest, penalties, and costs shall be subject to sale under such proceedings, when the amount due is ascertained. The court shall order a sale of such land for cash, subject to the equity of redemption. At all sales, the clerk of the court, acting for the state, shall bid the debt ascertained to be due for taxes, interest, penalties, and the costs incident to the collection thereof, where no other bidder offers the same or larger bid. The proceeds from such sale shall be applied first to the payment of the ten per cent (10%) penalty allowed as compensation for prosecuting the suits, second to the costs, and third the remainder shall be applied to the state first, county second, and the municipality third, the amount due each to be ascertained by a decree of the court.

No copy of the complaint and exhibit need be served on the defendant and instead a notice may issue from the clerk to accompany the summons. The notice shall identify the suit mentioned in the summons sufficiently to enable the taxpayer to know what delinquent taxes he is being sued for and what property is being subjected to the lien. The summons and notice may be for more than one suit where suits have been consolidated. Provided, constructive service of process shall be made as now provided by law. [Acts 1923, ch. 77, § 8; Shan. Supp., § 913b17; Code 1932, § 1591; Acts 1935, ch. 114, § ; C.

Supp. 1950, § 1591; Acts 1972 (Adj. S.), ch. 503, § 2; 1973, ch. 296, § 3.]

* * * *

67-2018. Advertisement of sale — Notice to present owner. — In the event of a sale under a decree of the court, the property shall be advertised in one (1) sale notice, which notice shall set out the names of the owners of the different tracts or parcels of land and a concise description of the property and the amount of judgment against each defendant. Said advertisement may be by publication in a newspaper as required by law, or by printed handbills as the courts may decree.

However, notice of the sale shall be sent by registered return receipt mail to the last known address of the present owner of any real property if the delinquent taxes for which the sale is to be conducted were assessed on the real property when owned by a prior owner of the real property.

The term "last known address of the present owner" shall be defined as the address of the owner of said property on record in the tax assessor's office of each county.

It shall be the responsibility of the property owner to register his name and address with the tax assessor of the county in which the land lies.

The property owner shall bear the cost of the registered return receipt mail and if the said registered mail is not claimed within twenty (20) days following mailing, the county may proceed as though the notice had been received. [Acts 1923, ch. 77, § 12; Shan. Supp., § 913b21; Code 1932, § 1596; 1976 (Adj. S.), ch. 695, § 1.]

No. 90-222

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BEVERLY ANN COOK, CLAUD RICHARD DOTY, WENDELL L. SMITH, JR., and LINDA SMITH WEST,

Petitioners,

vs.

ARAMINTA MCCULLOUGH; C & N LEASING and RENTAL CO., INC.; JIM ED CLARY, Property Assessor of the Metropolitan Government; BILL GARRETT, Trustee of Davidson County; and MULTIMEDIA, INC. d/b/a *THE NASHVILLE RECORD,*

Respondents.

On Petition for a Writ of Certiorari to the Tennessee Court of Appeals

BRIEF OF RESPONDENT, MULTIMEDIA, INC. d/b/a THE NASHVILLE RECORD IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should deny the petition for a writ of certiorari in this case on the ground that the federal constitutional issues raised in the petition were not properly presented to the Tennessee courts and have not been decided by the Tennessee courts?

LIST OF PARENT AND SUBSIDIARIES

Multimedia, Inc. has no parent.

The following Illinois corporations are the only subsidiaries of Multimedia, Inc. not wholly owned by Multimedia, Inc. or its wholly owned subsidiaries:

Multimedia Cablevision of Alsip, Inc.
Multimedia Cablevision of Chicago Ridge, Inc.
Multimedia Cablevision of Harvey, Inc.
Multimedia Cablevision of Hometown, Inc.
Multimedia Cablevision of Lisle, Inc.
Multimedia Cablevision of Phoenix, Inc.
Multimedia Cablevision of South Holland, Inc.
Multimedia Cablevision of Villa Park, Inc.

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SUMMARY STATEMENT OF RESPONDENT'S POSITION

The Respondent, Multimedia, Inc. d/b/a *The Nashville Record* respectfully urges the Court to deny the petition for certiorari in this case on the ground that the federal constitutional issues raised in the petition were not properly presented to the Tennessee courts and have not been decided by the Tennessee courts.

The petition for certiorari does not correctly state the issues before, or the holdings of, the Tennessee courts; omits the opinion of the Tennessee Court of Appeals, which noted that the Petitioners conceded that they had made no constitutional attack prior to the limited remand of the case; assumes that the identity and addresses of Petitioners were readily ascertainable, when they were not; does not accurately reflect the evidence on which the Tennessee courts based their decision that *The Nashville Record* was a newspaper of general circulation sufficient for the publication of tax sale notices in this case; and misstates the Tennessee law with respect to the raising of constitutional issues.

STATEMENT OF FACTS

For consideration of whether the writ of certiorari should be granted, the following facts are controlling:

1. Neither the Complaint in *Beverly Ann Cook, et al. v. William C. McCullough, et al.* (Pet. App., A-25), nor the Complaint in *Beverly Ann Cook, et al. v. C & N Leasing and Rental Co., Inc., et al.* (Pet. App., A-29) raised, or even mentioned, any constitutional issues, federal or state.

2. The two cases were consolidated. The original defendants filed motions to dismiss for failure to state a claim on which relief could be granted under Rule 12, Tennessee Rules of Civil Procedure. Since matters outside the pleadings were considered, the trial court treated the motions as motions for summary judgment, and entered a memorandum granting the motions. Nowhere in that memorandum is any constitutional issue considered, much less ruled upon. (Pet. App., A-39). The Findings of Fact in the Memorandum do not reflect that the identity and addresses of the Petitioners were readily ascertainable. For example, the names of the devisees of the record owner, John S. Edney, were stated in his will, but no findings were made as to the ascertainability of their addresses (Pet. App., A-41); one of

his devisees, Lillian Edney, died intestate, and the letters of administration did not disclose the identity of her heirs (Pet. App., A-41); and another devisee, Leona Edney, died testate and the names of her devisees are shown in her will, but the ascertainability of their addresses is not shown. (Pet. App., A-41, 42).

3. The Petitioners then appealed to the Tennessee Court of Appeals, which affirmed the decision of the trial court. The Court of Appeals, in its opinion, did not consider or rule upon any constitutional issue. (Pet. App., A-1).

4. Petitioners then filed a petition to rehear in the Court of Appeals alleging that the Court of Appeals failed to consider their attack on the adequacy of notice in *The Nashville Record,* which petition was overruled. (Pet. App., A-6).

5. The Petitioners then filed an application for permission to appeal to the Tennessee Supreme Court, which granted the application to "consider whether the Chancellor erred in holding that the publication of notice of tax sale in *The Nashville Record* was adequate notice to plaintiffs when there was no evidence in the record on that issue and without permitting the introduction of such evidence in a trial on the merits." (Pet. App., A-5). The Tennessee Supreme Court stated:

> In his amended findings of fact and conclusions of law, the Chancellor held that "Publication in the *Nashville Record* constitutes adequate notice to all parties." The record contains no evidence on the issue of adequacy of notice and no proof was presented on the issue by either side. The Chancellor cited no authority for his position. We are of the opinion that the Chancellor should have permitted proof on this issue and summary judgment was therefore inappropriate.

(Pet. App., A-6).

The Court further held that it agreed with the decision of the Court of Appeals on the issues that were addressed in its opinion, but remanded the case to the trial court for further proceedings relative to the limited issue stated. (Pet. App., A-6).

6. On the remand to the trial court, this Respondent, Multimedia, Inc. d/b/a *The Nashville Record,* was allowed to intervene as a party defendant. *Cook v. McCullough,* 735 S.W.2d 464, 466-467 (Tenn. App. 1987) (Res. App., A-6).

7. Petitioners then filed motions for leave to amend their Complaints in the trial court, raising for the first time allegations as to the constitutionality of the statutory procedures for tax sales under the Fourteenth Amendment to the United States Constitution, and seeking to join the State Attorney General as a party. This motion is quoted in *Cook v. McCullough,* 735 S.W.2d 464, 467-468 (Tenn. App. 1987) (Res. App. A-6-9).

8. The trial court denied the motion to amend (*Cook v. McCullough,* at p. 468) (Res. App. A-9).

9. The Petitioners then filed an application for extraordinary appeal to the Court of Appeals, presenting the following issue:

> Whether the Chancellor properly overruled Plaintiffs' only Motion to Amend the Complaints in these consolidated actions when the Amendment sought to raise issues which were not addressed by the appellate courts on a previous appeal and which the Chancellor had held, prior to that appeal, were not raised in the trial court; when some aspects of those issues pertain to a new defendant added since the initial appeal; and when no prejudice could result to Defendants from the timing of the Motion to Amend?

(*Cook v. McCullough,* at p. 468) (Res. App. A-9-10).

10. The Court of Appeals stated, at page 468:

> Plaintiffs concede that, prior to the limited remand to the Trial Court from the Supreme Court, no constitutional attack was made upon the procedure employed in the tax sales and the Attorney General of the State was not made a party to these actions. (Res. App., A-10).

11. The Court of Appeals held that its prior decision, based in part on Petitioners' conceded failure to raise constitutional issues, was the law of the case; that neither the trial court nor the Court of Appeals had authority to expand the limitations imposed by the Supreme Court on the remand; and affirmed the denial of the amendment. (*Cook v. McCullough,* pp. 470-471) (Res. App., A-12-13).

12. The Petitioners then filed a Motion for Summary Judgment in the trial court alleging that the tax notices did not contain an adequate description of the properties and did not contain the amount of the judgment for the delinquent taxes. The trial court held that those issues were outside the limited scope of the remand and denied the motion. (Pet. App., A-59).

13. The cases were then tried on the issue stated in the remand. The trial court held; (i) that publication in *The Nashville Record* satisfied the requirements of T.C.A. §67-2018; and (ii) publication in *The Nashville Record* was constitutionally adequate as a matter of due process, stating that Petitioners had failed to prove that publication of tax sales in *The Nashville Record* was constitutionally inadequate when compared to publication in some other newspaper. (Pet. App., A-65).

14. The Petitioners then appealed to the Tennessee Court of Appeals. The brief of this Respondent correctly stated the issues properly before that court:

> The Plaintiffs-Appellants (here "Plaintiffs") have not correctly stated the issues tried in the Chancery Court, or the decision of the Chancery Court on those issues; and, on that premise Plaintiffs have not correctly stated the

issues properly before this court. Accordingly, this Appellee, Multimedia, Inc. d/b/a *The Nashville Record* (here "*Nashville Record*") restates the issues as follows:

1. Whether publication of notice in *The Nashville Record* satisfied the requirements of then §67-2018 T.C.A. (1976); and

2. Whether such publication, as opposed to publication in some other medium, was constitutionally adequate as a matter of Due Process under the Fourteenth Amendment of the United States Constitution; and

3. Whether the Plaintiffs may properly raise issues on appeal which expand the limitation of the issues previously placed upon this case by the Tennessee Court of Appeals and the Supreme Court of Tennessee.

(Res. App., A-17).

15. In its opinion, the Court of Appeals decided the issues as posed by this Respondent. That court reviewed in detail the evidence in the record concerning the nature of *The Nashville Record,* including its contents, subscriber list, circulation, and format; and the testimony of Dean Kelly Leiter of the University of Tennessee College of Communications, expressing the opinion that *The Nashville Record* was a "newspaper" within the applicable statute, and that publication in *The Nashville Record* was as reasonable as any other method for the purpose of reaching persons not to be found by service of process. (Pet. App., A-11-17).

The Court of Appeals then held that *The Nashville Record* was a "newspaper" within the applicable statute.

As to the due process issue, the court held:

> There is no evidence in the record that publication in some other medium would have better satisfied due process than did publication in *The Nashville Record.* On the

> contrary, the evidence supports the conclusion that the publication in *The Nashville Record,* as opposed to some other medium, was the logical choice, because in 1978 it was the sole medium used in Davidson County for the publication of notices to creditors, notices of service of process, notices of foreclosure or notices of Chancery sales, including tax sales.

(Pet. App., A-22)

The court further rejected Petitioners' attempts to expand the issues. (Pet. App., A-23).

16. The Petitioners then filed an application for permission to appeal to the Tennessee Supreme Court, which was denied.

From the foregoing recitation, it is clear that the only due process issue properly before, and determined by, the Tennessee courts was, "Whether such publication, as opposed to publication in some other medium, was constitutionally adequate as a matter of due process under the Fourteenth Amendment of the United States Constitution." (Res. App., A-17).

ARGUMENT

I. FEDERAL CLAIMS MUST HAVE BEEN ADEQUATELY PRESENTED TO, AND DECIDED BY, THE STATE COURTS.

"It is well settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.' *Webb v. Webb,* 451 U.S. 493, 496-497, 101 S.Ct. 1889, 1891-1892, 68 L.Ed.2d 392 (1981)."

Board of Directors of Rotary Int'l. v. Rotary Club of Duarte, 481 U.S. 537, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474 (1987).

Bankers Life and Cas. Co. v. Crenshaw, 486 U.S. 71, 108 S.Ct. 1645, 1650, 100 L.Ed.2d 62 (1988).

"When ' " 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " ' *Exxon Corp. v. Eagerton,* 462 U.S. 176, 181, n. 3, 103 S.Ct. 2296, 2301, n. 3, 76 L.Ed.2d 497 (1983) (quoting *Fuller v. Oregon,* 417 U.S. 40, 50, n. 11, 94 S.Ct. 2116, 2123, n. 11, 40 L.Ed.2d 642 (1974) (quoting *Street v. New York,* 394 U.S. 576, 582, 89 S.Ct. 1354, 1360, 22 L.Ed.2d 572 (1969))))."

Board of Directors of Rotary Int'l. v. Rotary Club of Duarte, 481 U.S. 537, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474 (1987).[1]

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[1] For the purposes of denial of this petition, it is not necessary to determine whether these rules are jurisdictional or prudential; see, e.g., *Bankers Life and Cas. Co. v. Crenshaw,* 486 U.S. 71, 108 S.Ct. 1645, 1651, 100 L.Ed.2d 62 (1988).

II. THE ISSUES WHICH PETITIONERS SEEK TO RAISE IN THIS COURT WERE NOT PROPERLY PRESENTED TO, AND WERE NOT PASSED UPON, BY THE TENNESSEE COURTS.

The decisions of the highest state court to pass upon the merits of the petitions are found in the first opinion of the Tennessee Court of Appeals (Pet. App., A-1) and the third opinion of the Tennessee Court of Appeals (Pet. App., A-7). Manifestly, in neither opinion did the Court pass upon the claims asserted by Petitioners here.

The first opinion made no mention of any constitutional issue. The only constitutional issue decided in the third opinion was whether publication in *The Nashville Record* as opposed to publication in some other medium was constitutionally adequate as a matter of due process. (Pet. App., A-22).

It is true on the remand to the trial court the Petitioners attempted to amend their Complaints to raise issues similar to those they seek to raise here. However, those claims were not timely or properly asserted. As the Tennessee Court of Appeals noted, the Petitioners conceded that prior to the limited remand no constitutional attack was made and the Attorney General of the State was not made a party to these actions.[2] The limitations on the remand, excluding consideration of the claims these petitioners now seek to assert, became the law of the case.

Thus, the conceded failure of Petitioners to raise these constitutional issues in a timely and proper manner, resulted in their not being considered in the first decision of the Tennessee Court

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[2] T.C.A. §29-14-107(b) requires the Attorney General to be made a party in proceedings involving the validity of a statute of statewide effect. That provision is mandatory, *Cummings v. Shipp,* 156 Tenn. 595, 3 S.W.2d 1062 (1928); and the Attorney General is an indispensable party, *Dodd v. Barnes,* 279 F.Supp. 291 (E.D. Tenn. 1967).

of Appeals and their being precluded from consideration on the limited remand or the subsequent appeals.

There was nothing unusual, much less arbitrary, in the procedures followed by the Tennessee courts. Indeed, those procedures are common throughout the jurisdictions of this country. See, e.g., cases cited in *Cook v. McCullough,* 735 S.W.2d, at pages 470-471.

III. RAISING CONSTITUTIONAL CLAIMS IN TENNESSEE COURTS.

"It has long been the general rule that questions not raised in the trial court will not be entertained on appeal and this rule applies to an attempt to make a constitutional attack upon the validity of a statute for the first time on appeal unless the statute involved is so obviously unconstitutional on its face as to obviate the necessity for any discussion. *City of Elizabethton v. Carter County,* 204 Tenn. 452, 321 S.W.2d 822 (1958); *Veach v. State,* Tenn., 491 S.W.2d 81 (1973); *Harrison v. Schrader,* Tenn. 569, S.W.2d 822 (1978); *Dorrier v. Dark,* Tenn., 537 S.W.2d 888, Rehearing 540 S.W.2d 658, (1976). Rule 36A TRAP." *Lawrence v. Stanford,* 655 S.W.2d 927, 929 (Tenn. 1983).

This rule is well settled in the Tennessee decisions; see, e.g., *Presley v. Hanks,* 782 S.W.2d 482, 490 (Tenn. App. 1989); *Dement v. Kitts,* 777 S.W.2d 33 (Tenn. App. 1989); and *Mallicoat v. Poynter,* 722 S.W.2d 681 (Tenn. App. 1986).

The Tennessee courts properly did not consider the statutory procedures attacked by Petitioners to be so obviously unconstitutional as to obviate the necessity for any discussion. Petitioners have cited no case so holding.

IV. THE APPLICABILITY OF THE RULES WITH RESPECT TO THE PROPER PRESENTATION AND DECISION OF CONSTITUTIONAL CLAIMS BY STATE COURTS IS PARTICULARLY APPROPRIATE WITH RESPECT TO PETITIONERS' DUE PROCESS CLAIMS.

Due Process issues are particularly likely to require a factual context.

> "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

The policies underlying the requirement that federal issues be properly presented and ruled upon by state courts are, thus, particularly significant with respect to due process issues. Those policies are, "First, comity to the states, and, second, a constellation of practical considerations, chief among which is our need for a properly developed record on appeal." *Bankers Life and Cas. Co. v. Crenshaw,* 108 S.Ct. at p. 1651; or, as stated in *Cardinale v. Louisiana,* 394 U.S. 437, 439, 89 S.Ct. 1161, 1163, 22 L.Ed.2d 398 (1969), "Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind."[3]

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[3] Similar considerations underlie the rules followed by the Tennessee Supreme Court in refusing to review constitutional issues not raised in the trial court. *Lawrence v. Stanford,* 655 S.W.2d 927, 929 (Tenn. 1983).

In this case the absence of any factual record compiled with these constitutional issues in mind is particularly crucial. Consider, e.g., the facts developed in *Bender v. City of Rochester,* 765 F.2d 7, 11-12 (1985), involving the search of the surrogate records in New York:

> However, we note that an inquiry of this sort will not necessarily identify the successors in interest of the deceased owner of property. If the decedent did not reside in the same county where the property is located, the inquiry would be fruitless because there would be no record about the estate in the clerk's office of the Surrogate Court of that county. Even if the decedent resided in the same county, however, the identity of the successors in interest and the nature of their interests may not become clear until probate proceedings are complete. Beneficiaries may have conflicting claims, and, in some cases, their beneficiary status may be initially unknown to themselves and to the administrator. Moreover, though the burden of inspecting records of the Surrogate's Court is not heavy, it is a task beyond the routine examination of land records that was involved in *Mennonite.*

Tennessee, and its citizens, have a legitimate interest in avoiding the uncertainties created by such uncertainties as to claimed ownership of real property for the purpose of tax sale notices. The requirement of advising the tax assessor of such ownership claims is not unreasonable. See, e.g., *Lehr v. Robertson,* 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983), putative father not entitled to notice of adoption proceedings when he failed to register with Putative Father Registry in accordance with statute. The failure of Petitioners properly to raise their due process claims precluded the development of the facts with respect to the interests involved in this process.

Moreover, as the Tennessee Court of Appeals stated, in 1978 *The Nashville Record* was "the sole medium used in Davidson

County for the publication of notices to creditors, notices of service of process, notices of foreclosure or notices of Chancery sales, including tax sales." (Pet. App., A-22).

Thus, a decision holding that the publication procedures followed in this case were unconstitutional would affect the validity of thousands of transactions and the title to innumerable tracts of land. Tennessee, and other states, and their citizens, have a highly significant interest in procedures protecting the security of transactions and assuring the title of land. No such interest should be jeopardized without a full review on a complete record made for that purpose.

The failure of Petitioners to raise their due process claims in a timely and proper manner precluded the development of such a record. That failure should likewise preclude their attempts to raise such issues in this Court.

CONCLUSION

For the reasons stated, this Court should deny the Petition for a Writ of Certiorari to the Tennessee Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDICES

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APPENDIX A

Beverly Ann COOK, Claud Richard Doty, Wendell L. Smith, Jr., and Linda Smith West, Plaintiffs-Appellants,

v.

Araminta McCULLOUGH, C & N Leasing and Rental Co. Inc., Jim Ed Clary, Property Assessor of the Metropolitan Government, Bill Garrett, Metropolitan Trustee, and Multimedia, Inc., d/b/a the Nashville Record, Defendants-Appellees.

Court of Appeals of Tennessee
Middle Section, at Nashville.

April 16, 1987.

Permission to Appeal Denied by
Supreme Court Aug. 3, 1987.

In consolidated actions to set aside tax deeds, property owners filed application for extraordinary appeal. Order of the Chancery Court of Davidson County, Irvin H. Kilcrease, Jr., Chancellor, denied motion to amend complaints. The Court of Appeals, Todd, P.J. (M.S.), held that property owners were not entitled to amend complaint to add issues going beyond limitation placed by Supreme Court upon remand.

Affirmed and remanded.

OPINION

TODD, Presiding Judge, Middle Section.

This venerable controversy is now on its second excursion through the appellate process. Since previous appellate rulings are material to the present appellate issue; a review of previous procedure is necessary.

On January 21, 1982, the plaintiffs filed this suit seeking to set aside a tax deed executed on January 25, 1979, to defendants

William C. and Araminta McCullough as a result of a tax sale to satisfy delinquent taxes upon the described property. A similar suit by plaintiffs relating to the tax sale of another tract to C & N Leasing and Rental Co. was consolidated with the first mentioned suit.

On September 22, 1982, the Trial Judge entered an order dismissing both suits. Upon appeal to this Court, an opinion was filed on October 18, 1983, stating:

> The appellants filed separate actions in the court below to invalidate the sale of two tracts of land sold at a tax sale on January 25, 1979. The complaint alleged that John S. Edney, the record owner of the parcels in question, died on March 14, 1969 and left all his property by will to his four sisters. The will was duly probated in Davidson County, Tennessee. The appellants take their interest in the property by will or intestate succession through one of the four sisters. Since the appellants were not served with process in the tax sale nor had any other notice of sale, they alleged that the sale was void as to them.
>
> . . . The defendants filed answers or motions to dismiss and the cases were consolidated for disposition. Since the basis for the motions to dismiss was that the complaint failed to state a cause upon which relief could be granted and matters outside the pleadings were considered by the court, the motions were treated as motions for summary judgment pursuant to Rule 12.02 of the Tennessee Rules of Civil Procedure. The lower court granted the motions and dismissed the complaints. By agreement the court filed findings of fact and conclusions of law.
>
> It is the position of the appellants that since the will of John Edney was of record in Davidson County, it was possible for the taxing authorities to ascertain the present owners of the property in order that they might be given notice of the suit to collect delinquent taxes.

The defendants all contend that the burden is on the property owner to notify the tax assessor of his or her interest in the property in order that notice may be given.

In this respect the defendants rely on T.C.A. §67-2018 which deals with the question of notice to the present owner. That section provides:

> In the event of a sale under a decree of the court, the property shall be advertised in one (1) sale notice, which notice shall set out the names of the owners of the different tracts of parcels of land and a concise description of the property and the amount of judgment against each defendant. Said advertisement may be by publication in a newspaper as required by law, or by printed handbills as the court may decree.
>
> However, notice of the sale shall be sent by registered return receipt mail to the last known address of the present owner of any real property if the delinquent taxes for which the sale is to be conducted were assessed on the real property when owned by a prior owner of the real property.
>
> The term "last known address of the present owner" shall be defined as the address of the owner of said property on record in the tax assessor's office of each county.
>
> It shall be the responsibility of the property owner to register his name and address with the tax assessor of the county in which the land lies.
>
> The property owner shall bear the cost of the registered return receipt mail and if the said registered mail is not claimed within twenty (20) days following mailing, the county may proceed as though the notice had been received.

It seems obvious that the above section dealing with a notice to be given in a suit for the sale of real property for taxes puts the burden on the present owner of the property to register his name with the tax assessor so that he may get notice in the event of a sale.

The appellants contend that since the will of John Edney was of record, the plaintiffs became the "record owners" and were entitled to notice without more. We cannot accept that interpretation of the statute. We think the statute says the opposite: The owner is required to register his name and address with the tax assessor rather than the taxing authorities being required to search the records for evidence of ownership. This result is consistent with the recent case of *Morris v. Beard,* Tenn.App. (Filed in Knoxville February 12, 1982).

The action to sell real estate for delinquent taxes is an action in rem. T.C.A. §67-1804. Although persons having an interest in property which is the subject of an in rem proceeding are entitled to notice, the notice required is "the best notice possible under the circumstances." *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Baggett v. Baggett,* 541 S.W.2d 407 (Tenn. 1976). In this case, since the appellants' interest was not on record in the tax assessor's office as required by the statute, they were not entitled to any more notice than that given them by publication in the newspaper.

For all of these reasons the decree of the Chancellor is affirmed.

Upon application for permission to appeal, on October 18, 1983, the Supreme Court entered the following order:

On considering the application for permission to appeal and briefs filed in this case and the entire record, the ap-

> plication of Beverly Ann Cook, et al, is granted for consideration of appellants' contention that the chancellor erred in holding that the publication of notice of tax sale in the *Nashville Record* was adequate notice to the appellants without any evidence in the record on that issue and without permitting the introduction of such evidence in a trial on the merits.

Upon considering said limited appeal, on November, 19, 1984, the Supreme Court filed an opinion which stated:

> In his amended findings of fact and conclusions of law, the Chancellor held that "Publication in the *Nashville Record* constitutes adequate notice to all parties." The record contains no evidence on the issue of adequacy of notice and no proof was presented on the issue by either side. The Chancellor cited no authority for his position. We are of the opinion that the Chancellor should have permitted proof on this issue and summary judgment was therefore inappropriate.
>
> We agree with the decision of the Court of Appeals on the issues that were addressed in its opinion. However, the issue of the adequacy of notice was not addressed, although it had been brought to the attention of the Court of Appeals in Plaintiff's brief and in Plaintiff's petition to rehear. We therefore remand the case to the trial court for further proceedings relative to the notice issue. Costs of this appeal shall be taxed to the Defendants.

The judgment of the Supreme Court entered the same date stated:

> This cause coming on to heard upon the entire record from the Court of Appeals, Middle Section at Nashville, a limited application for permission to appeal having heretofore been granted to consider whether the Chancellor erred in holding that the publication of notice of tax sale in the

Nashville Record was adequate notice to Plaintiffs when there was no evidence in the record on that issue and without permitting the introduction of such evidence in a trial on the merits; and upon consideration thereof, this Court is of opinion that the case should be remanded for further proceedings relative to the notice issue.

In accordance with the opinion filed herein, it is, therefore ordered and decreed by this Court that the case is remanded to the Chancery Court of Davidson County for further proceedings relative to the notice issue, and for the collection of costs accrued below.

Costs of appeal will be paid by A. aminta McCullough, C & N Leasing & Rental Co., Inc., Jim Ed Clary, Property Assessor of the Metropolitan Government, and Bill Garrett, Trustee of Davidson County, for which execution may issue if necessary. 1/19/84.

Upon remand, an agreed order was entered permitting Multimedia, Inc., d/b/a The Nashville Record to intervene as a party defendant.

On February 28, 1986, plaintiffs filed the following motion in the Trial Court:

Pursuant to Rule 15 of the Tennessee Rules of Civil Procedure, Plaintiffs respectfully move the Court to permit them to amend their Complaints in these consolidated actions in the following respects:

1. Each Complaint is amended by adding the following additional paragraphs to the allegations:

17. Plaintiffs further allege that the statutes governing delinquent taxpayers actions, including T.C.A. §67-5-2424, 67-5-2415, 67-5-2501, and 67-5-2502, formerly § 67-2012 and 67-2018, have been inter-

preted to permit the filing of actions to sell Plaintiffs' Properties (as defined in paragraph 4 of each Complaint), the prosecution of such actions, the entry of decrees ordering the sale for delinquent taxes, the publication of tax sale notices, and the sale of the Properties, all without any actual or constructive service upon any of Plaintiffs or any of their predecessors who owned an interest in the Properties at the time their suits were instituted, or any notice of any kind whatsoever that their Properties were being sold for delinquent taxes, because Plaintiffs and their predecessors in title had not notified the Tax Assessor of Davidson County of their ownership interest in the Properties. Plaintiffs further aver that no actual or constructive service was ever attempted for any of Plaintiffs, or any of their predecessors who owned an interest in the Properties when the actions to sell those Properties were commenced, even though their ownership was a matter of public record; the only service attempted was for a man who had died and whose Will had been probated over eight years prior to the time the actions to sell the Properties were filed.

18. Plaintiffs aver that the institution of said actions to sell the Properties, the prosecution of such actions, the entry of decrees ordering the sale of the Properties, and the sales of those Properties for delinquent taxes, without any actual or constructive service of process, or any notice to, any of Plaintiffs, or their predecessors in title who owned an interest in the Properties at that time, and any state statute, including T.C.A. §§ 67-5-2414, 67-5-2415, 67-5-2501, and 67-5-2502, permitting delinquent taxpayers actions to be conducted in this manner without service of process or notice, violate the Due Process Clause

and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 8 of the Tennessee Constitution. Plaintiffs further aver that these constitutional requirements have been recognized by both the Tennessee Supreme Court (in *Marlowe vs. Kingdom Hall of Jehovah's Witnesses,* 541 S.W.2d 121 (Tenn. C.St.1976)) and the United States Supreme Court (in *Mullane v. Central Hanover Bank & Trust,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)).

19. Plaintiffs aver that since the actions to sell their Properties and the sales of those Properties were conducted in violation of provisions of the United States and Tennessee Constitutions, said sales were void, and that title should be divested out of Defendants McCullough and C & N Leasing & Rental Co., Inc. and revested in Plaintiffs.

20. W.J. Michael Cody is the Attorney General and Reporter of the State of Tennessee and is made a party to this action pursuant to T.C.A. § 29-14-107, since this action questions the constitutionality of certain Tennessee statutes.

2. The prayers for relief in each Complaint are amended to read as follows:

1. That the Court hold that the tax sales of Plaintiff's properties were void because they were conducted in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States and in violation of the provisions of Article I, Section 8 of the Tennessee Constitution, and because the tax sales notices did not comply with statutory and constitutional requirements.

2. That the Court, upon payment to Defendants C & N Leasing & Rental Co., Inc. and McCullough of such amounts as may be legally reimbursed to them, divest title to the Properties in the proportions set forth in paragraph 10 of each Complaint.

3. That the Court assess the costs of this action against Defendants.

4. That the Court grant Plaintiffs such other and further relief as may be appropriate upon the evidence produced herein.

In support of this Motion, Plaintiffs file the attached Memorandum Brief.

On March 14, 1986, said motion was overruled by the following order:

This cause came to be heard before the Honorable Irvin H. Kilcrease, Jr., Chancellor, on the Plaintiffs' Motion to Amend their Complaints in these consolidated actions, and after consideration of Plaintiffs' Motion, the record in these consolidated actions, the arguments of counsel and the law of the case as heretofore set out by this Honorable Court, the Court of Appeals of Tennessee, and the Supreme Court of Tennessee, this Honorable Court has determined that the allegations sought to be included by Plaintiffs' in their Motion to Amend are barred by the law of the case.

On March 27, 1986, plaintiffs filed a "motion to reconsider" (which is not provided for in T.R.C.P.).

On April 7, 1986, said "motion to reconsider" was overruled and application for permission to appeal was denied.

On October 2, 1986, plaintiffs filed an application for extraordinary appeal from the order entered on March 14, 1986, overruling plaintiff's motion to amend.

On November 7, 1986, this Court granted the extraordinary appeal which is the subject of this opinion.

In this appeal, plaintiffs present the following issue:

> Whether the Chancellor properly overruled Plaintiffs' only Motion to Amend the Complaints in these consolidated actions when the Amendment sought to raise issues which were not addressed by the appellate courts on a previous appeal and which the Chancellor had held, prior to that appeal, were not raised in the trial court; when some aspects of those issues pertain to a new defendant added since the initial appeal; and when no prejudice could result to Defendants from the timing of the Motion to Amend?

Plaintiffs concede that, prior to the limited remand to the Trial Court from the Supreme Court, no constitutional attack was made upon the procedure employed in the tax sales and the Attorney General of the State was not made a party to these actions.

[1] Plaintiffs insist, however, that the agreed order permitting intervention of Nashville Record as a party defendant opened the door to adding additional issues beyond that stated by the Supreme Court in its remand. This Court does not agree because the intervention of the Nashville Record as a party defendant added nothing to the issues stated in the remand. The answer filed by said defendant does state:

> 18. *The Nashville Record* as a forum for the publication of the Order of Publication and the Notice of Sale fully satisfied the requirements of the United States and Tennessee Constitutions and all laws of the State of Tennessee.
>
> 19. Plaintiffs are estopped from claiming that *The Nashville Record* was not a proper forum for the publication of the Order of Publication or the Notice of Sale. Plaintiffs claim the property at issue as heirs of the

> estates of Leona Edney and Jessylea Edney Smith, yet both estates utilized *The Nashville Record* to publish legal notice to creditors. The Plaintiffs, Wendell L. Smith, Jr., Beverly Ann Cook and Linda Smith West, moreover, were Co-Administrators of the estate of Jessylea Edney Smith. Wendell L. Smith, Jr. was also the Executor of the estate of Leona Edney. The Plaintiffs, therefore, are estopped from asserting that *The Nashville Record* is an improper forum for the publication of notices when they have simultaneously claimed the benefits of publication in that newspaper.

However, the quoted allegations are merely assertions of fact in support of the Nashville Record as an appropriate medium for the publication of the notices herein.

The action of the Supreme Court approved and affirmed the conclusion and judgment of this Court that, by failure to register their names as owner/taxpayers of the subject property, plaintiffs forfeited the right to notice of the tax suit and of tax sale. However, plaintiffs would have standing to question the adequacy of the notice to the owner on record with the tax assessor. This being true, the limited purpose of the issue on remand (adequacy of published notice) was to ascertain whether the publication in the Nashville Record was adequate notice to the taxpayer (the record owner, John S. Edney, deceased) of the pending action and to the public at large that the property was to be sold for taxes.

[2] The amendment offered by plaintiffs first asserts that they, as owners of record, were entitled to actual or constructive notice of the tax sale. This Court has held to the contrary, and the Supreme Court has affirmed.

The proposed amendment also asserts that the lack of actual or constructive notice to plaintiffs "or their predecessors in title who owned a interest in the Properties at that time" resulted in a violation of the Fourteenth Amendment to the Constitution of

the United States and Article I, Section 8 of the Constitution of Tennessee, citing *Marlowe v. Kingdom Hall of Jehovah's Witnesses,* Tenn., 541 S.W.2d 121 (1976) and *Mullane v. Central Hanover Bank and Trust,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Although the constitutional question was not expressly pled in former pleadings, and expressly excluded from the Chancellor's first decision, the opinion of this Court cited *Mullane v. Central Hanover Bank and Trust Co.,* supra, in holding plaintiffs were entitled to no more notice than "the best possible under the circumstances."

In the plaintiffs' application to the Supreme Court for permission to appeal from the former decision of this Court, plaintiffs' issues were stated as follows:

> (1) Whether property can be sold to pay delinquent taxes without any services of process, either actual or constructive, upon the record owner of that property when that owner has failed to notify the Tax Assessor of his ownership interest, in accordance with T.C.A. § 67-2018.
>
> (2) Whether the Chancellor properly dismissed Plaintiff's Complaints for failure to state a claim upon which relief could be granted despite uncontradicted evidence that the tax sale auction notices failed to comply with statutory and constitutional requirements and properly held that publication in *The Nashville Record* was adequate without the benefit of any evidence in the record and without giving Plaintiffs the opportunity to introduce evidence to attack the adequacy of such publication.

The action of the Supreme Court, cited above, rejected the attack upon the decision of this Court that plaintiffs were not entitled to notice as property owners. By its limited remand for an evidentiary hearing upon the adequacy of the Nashville Record publication, the Supreme Court undoubtedly included Constitutional and statutory provisions as standards for adequacy of the notice to "record owners", but not as to "non record owners", as these plaintiffs have been conclusively held to be.

In summary, the holdings of this Court, as affirmed by the Supreme Court, and the holding of the Supreme Court as to limit of remand constitute the law of the case, foreclosing and excluding any complaint, constitutional or otherwise, as to the omission of the names of plaintiffs from the tax sale proceedings or any notices pursuant thereto. *National Life & Acc. Ins. Co. v. Morrison,* 179 Tenn. 29, 162 S.W.2d 501 (1942); *Life & Cas. Ins. Co. v. Jett,* 175 Tenn. 295, 133 S.W.2d 997 (1939); *Fields v. Gordon* 33 Tenn.App. 465, 232 S.W.2d 320 (1948); *Securities Investment Co. v. White* 19 Tenn. App. 540, 91 S.W.2d 581 (1935). On the other hand, the remand by the Supreme Court appears to leave open any other questions of fact or law relating to the adequacy, constitutional, statutory, or otherwise, of the notice which was published. That is, the Trial Court is free to hold that the notice was inadequate for any reason except that plaintiff's names were omitted therefrom.

The amendment offered by plaintiffs was in part in contradiction of the law of the case and otherwise was unnecessary to the execution of the remand by the Supreme Court.

[3] Neither the Trial Judge nor this Court has authority to expand the limitation placed by the Supreme Court upon a remand.

The foregoing is supported without dissent by authority from other jurisdictions. In 5-B C.J.S., Appeal and Error § 1969(5), the text states:

> The pleadings may not be amended after the cause has been remanded for a restricted purpose.

In *State v. Up-to-Date Shoe Repairing Co.,* 178 La. 1068, 152 So. 906 (1934), the trial court dismissed the suit of the State to collect an occupational tax on the basis of a claimed exemption. On appeal, the Supreme Court disallowed the exemption, reversed the dismissal and remanded for ascertainment of the amount of tax due. The Trial Court overruled a motion of

defendant to amend to present a constitutional question and rendered judgment against the defendant who appealed. On a second appeal, the Supreme Court affirmed and said:

> The trial judge was clearly correct in refusing to pass upon the plea of unconstitutionality filed by defendant after the case had been remanded to the district court. The case was remanded solely for the purpose of permitting plaintiff to offer evidence to sustain the state's demand. And it is well settled that no new issue can be raised after a case has been remanded by the appellate court for the restricted purpose of admitting evidence on a particular issue of fact. *Stark v. Burke,* 9 La.Anno. 344; *In re Quaker Realty Co.,* 127 La. 208, 53 So. 526; *Lehman Dry Goods Co. v. Lemoine* (On Rehearing), 129 La. 382, 56 So. 324; *Davis v. New Orleans Public Belt R.R.,* 159 La. 431, 105 So. 421.
>
> In *Stark v. Burke,* which was expressly approved in *Lehman Dry Goods v. Lemoine,* Slidell, C.J., speaking for the court, well said:
>
> "The time of a court of justice should not be occupied with determining a cause on the general merits, only to reach the fruitless result of setting aside its decree, not because it is erroneous in the case presented, but because the litigant desires to present a new question which he might have presented before."

In *Stolp v. Reiter,* 195 Minn. 372, 263 N.W. 118 (1935) plainiff sued to recover his part of the proceeds of a sale of furniture by defendant. After judgment and appeal, the Supreme Court remanded for further hearing upon the issue of portion of the purchase price of the furniture paid by plaintiff. Upon appeal from the second judgment, plaintiff complained that, on remand the trial court had refused to allow plaintiff to amend to demand a full accounting of all his partnership transactions with defendant. The Supreme Court affirmed on the ground

that the proposed amendment went beyond the scope of the limited remand.

In *Holcomb v. McClure,* 217 Miss. 617, 64 So.2d 689 (1953) plaintiff sued for damages for deficiency in quantity of realty purchased from defendant. After judgment for plaintiff and appeal, the Supreme Court affirmed as to liability and remanded for a new trial on damages alone. After judgment on remand, defendant appealed, arguing that the previous affirmance of liability by the Supreme Court was erroneous. The Supreme Court rejected the argument and said:

> Without further discussion of the cases, we will say that the rule in this State is that the law of the case as established on appeal will normally and ordinarily control on later trials and appeals of the same case involving the same issues and facts. 64 So.2d at 691.

Also in *Holcouch v. McClure,* the defendant complained on appeal of the refusal by the trial court on remand to allow defendant on remand to amend his answer and to file a cross bill to allege mutual mistake and estoppel. The Supreme Court held:

> . . . The facts which were the basis for the proposed amendment and cross-bill were before the chancellor on the first trial, and he so recognized in his opinion on the second trial when he stated: "all such matters grew out of the facts tried before this court on the former hearing. The defendants elected to defend the cause without raising this defense and they are now bound by such election." The chancellor applied the law of the case and refused to allow the amendments. He was correct in so doing, as appellants had no right to reopen the question of liability after this Court had affirmed on liability and remanded the case for hearing on the issue of damages alone. Appellants could not indirectly accomplish this result by filing modified pleadings based on the original facts and circumstances

which had been passed upon by the chancery court and by this Court.

In *Albuquerque Broadcasting Co. v. Bureau of Revenue,* 54 N.M. 133, 215 P.2d 819 (1950) the New Mexico Supreme Court held that, where the Supreme Court had remanded for determination of a particular amount, it was reversible error for the trial court to permit plaintiff to amend its complaint and try the entire case anew in contravention of the appellate opinion which was the law of the case.

To the same effect are *Consolidated Cut Stone Co. v. Seidenbach,* 189 Okl. 128, 114 P.2d 480 (1941); *Enterprise Garnetting Co. v. Forcier,* 69 R.I. 455, 35 A.2d 1 (1943) and *Howell v. Walker,* 126 Ark. 197, 189 S.W.2d 1058 (1916).

The order of the Trial Court is affirmed. The cause is remanded for further proceedings consistent with the opinion and order of the Supreme Court. Costs of this appeal are taxed against the plaintiffs.

Affirmed and remanded.

LEWIS and CANTRELL, JJ., concur.

APPENDIX B

THE ISSUES PRESENTED FOR REVIEW

The Plaintiffs-Appellants (here "Plaintiffs") have not correctly stated the issues tried in the Chancery Court, or the decision of the Chancery Court on those issues; and, on that premise Plaintiffs have not correctly stated the issues properly before this court. Accordingly, this Appellee, Multimedia, Inc., d/b/a *The Nashville Record* (here *"Nashville Record"*) restates the issues as follows:

1. Whether publication of notice in *The Nashville Record* satisfied the requirements of then §67-2018 T.C.A. (1976); and

2. Whether such publication, as opposed to publication in some other medium, was constitutionally adequate as a matter of Due Process under the Fourteenth Amendment of the United States Constitution; and

3. Whether the Plaintiffs may properly raise issues on appeal which expand the limitation of the issues previously placed upon this case by the Tennessee Court of Appeals and the Supreme Court of Tennessee.

No. 90-222

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BEVERLY ANN COOK, CLAUD RICHARD DOTY, WENDELL L. SMITH, JR., and LINDA SMITH WEST,

Petitioners,

vs.

ARAMINTA MCCULLOUGH; C & N LEASING and RENTAL CO., INC.; JIM ED CLARY, Property Assessor of the Metropolitan Government; BILL GARRETT, Trustee of Davidson County; and MULTIMEDIA, INC. d/b/a *THE NASHVILLE RECORD,*

Respondents.

On Petition for a Writ of Certiorari to the Tennessee Court of Appeals

BRIEF OF RESPONDENTS JIM ED CLARY AND BILL GARRETT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

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SUMMARY STATEMENT OF RESPONDENTS' POSITION

Respondents Jim Ed Clary, Property Assessor of The Metropolitan Government of Nashville and Davidson County, and Bill Garrett, Trustee of Davidson County, respectfully insist that this Court should deny the petition for a writ of certiorari on the grounds that the decisions of the courts of Ten-

nessee in this case are not in conflict with prior decisions of this Court.

Petitioners have failed to establish a conflict between the prior decisions of this Court and the decisions of the courts of Tennessee in this case because the preceding decisions of this Court are factually distinguishable from the instant case. Petitioners claim that as a result of the operation of Tennessee Code Annotated §67-2018 they were denied due process in that they were not provided with actual notice of the pendency of an action to sell their properties to satisfy tax liens and were not provided notice of the sale of their properties. These claims are based on the totally erroneous assumption that their names and addresses were readily ascertainable by Respondents Jim Ed Clary and Bill Garrett. To fully and finally ascertain that Petitioners' claims are without merit the prior decisions of this Court will be distinguished from the case at bar. Moreover, recent case law will be presented which distinguishes and limits the holdings of decisions of this Court considered by Petitioners to be very persuasive.

ARGUMENT

In this case, Petitioners have failed to prove that their interests in the properties in question were known by Respondents Clary and Garrett. Petitioners correctly state that the leading case of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) held that due process requires a form of notice reasonably calculated under the circumstances to apprise the holder of a legally protected property interest of the pendency of the action and that notice by publication is insufficient where the identity and location of the property owner were known. Petitioners further state that in the latter instance, actual notice was required while notice by publication was permissible for unknown owners. Petitioners, however, neglect to cite the portion of the *Mullane* decision which indicates "that there is no formula which can be used to determine when actual or constructive notice must be utilized. This determination of necessity must be made on a case by case basis". *Id.* 339 U.S. at 314, 70 S.Ct. at 657, 94 L.Ed. at 873. This Court's failure to set forth a formula to determine when actual or constructive notice must be utilized is damaging to Petitioners' allegation that *Mullane* is applicable to the facts underlying their claims. It is plain that the notice due will, of necessity, turn on the facts of each case. In *Mullane* the state actually knew the identity of the party seeking notice and the statutory provision for notice to trust beneficiaries was only subject to due process objections and held to be unconstitutional as regards those beneficiaries whose addresses and specific interests were known. These beneficiaries were held to be entitled to actual notice. *Id.* 339 U.S. at 318, 70 S.Ct. at 659, 94 L.Ed. at 875.

Absent knowledge of the Petitioners' interests or whereabouts, they were only entitled to notice by publication in the name of John S. Edney, the decedent through which they claim an interest in the properties in question. Since actual service of process on Mr. Edney was not possible, constructive service by

publication was the best method available to apprise the owners of the properties of the pending actions to sell the properties for delinquent taxes.

Respondents Clary and Garrett agree that where the names and addresses can be ascertained from local land records, there are no compelling or persuasive reasons why actual notice cannot be given to property owners regarding an impending tax sale. Petitioners contend that *Covey v. Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956), *Nelson v. City of New York*, 352 U.S. 103, 77 S.Ct. 195, 1 L.Ed.2d 171 (1956), *Walker v. City of Hutchinson*, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956), and *Schroeder v. New York City*, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962), support their position that they were entitled to actual notice of the tax sale whereby their properties were sold. In all of the foregoing cases state officials either knew the identities of the property owners or the identities of the property owners were very easily ascertainable by referring to local land records. Petitioners' names and addresses, however, could not be ascertained from local land records, and as a result they were not entitled to actual notice of the tax sale. Also, in *Walker* this Court reiterated the holding in *Mullane* by stating that in some cases it might not be reasonably possible to give personal notice, for example, where people are missing or unknown. *Walker v. City of Hutchinson*, 352 U.S. at 115-116, 77 S.Ct. at 202, 1 L.Ed.2d at 182. Therefore, because Petitioners' names and addresses were not readily ascertainable from local land records, Petitioners were only entitled to constructive notice which was the best notice possible under the circumstances.

Petitioners' names and addresses were not of record in the land records for Davidson County and, contrary to this Court's finding in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), were not reasonably ascertainable by Respondents Jim Ed Clary and Bill Garrett through reasonably diligent efforts. Petitioners contend that

Mennonite is persuasive in that it reaffirmed that the principles discussed in *Mullane* were generally applicable to proceedings to sell property for delinquent taxes or to foreclose statutory property tax liens. In *Mennonite*, the property owner had received actual notice of the tax sale, however, the mortgagee had only received notice by publication. This Court held that before the state conducts any proceeding that will affect the legally protected property interest of any party, the state must provide notice to that party by means reasonably calculated to ensure actual notice as long as the party's identity and location are reasonably ascertainable. *Id.* 462 U.S. at 800, 103 S.Ct. at 2712, 77 L.Ed.2d at 188. *Mennonite* broadened the scope of the individuals and interests that are entitled to actual notice to satisfy due process requirements. However, *Mennonite* specifically maintained the limitation set forth in *Mullane* which requires that the individual must be reasonably ascertainable before due process will require actual notice. The mortgagee in *Mennonite* was reasonably ascertainable because it was identified in a mortgage that was publicly recorded in the land records. *Mennonite* only requires the county officials to make "reasonably diligent efforts" to uncover the identities of real property owners. *Id.* 462 U.S. at 798, 103 S.Ct. at 2711, 77 L.Ed.2d at 187.

Petitioners' arguments conflict with the holding in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), since Petitioners seek to require Respondents Clary and Garrett to conduct impracticable and extended searches in the name of due process. In *Pope*, this Court simply reiterated the holding of *Mennonite* that an individual had to be known or reasonably ascertainable before actual notice would be required. This Court acknowledged that the *Mullane* line of cases does not "require impracticable and extended searches in the name of due process." *Id.* 485 U.S. at 490, 108 S.Ct. at 1347, 99 L.Ed.2d at 578, quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 317-318, 70 S.Ct. at 659, 94 L.Ed. at 875.

Respondents rely upon *Bender v. City of Rochester,* 765 F.2d 7 (2d Cir. 1985), in support of the contention that a search of probate records is unreasonable to determine Petitioners' interests and addresses. In *Bender*, an administrator brought suit challenging the city's foreclosure of its tax lien and its subsequent sale of a parcel of real property. The Second Circuit held that the city satisfied the requirements of due process by mailing notice to persons indicated on land records as owners. The court found that "though the burden of inspecting records of the surrogate's court is not heavy, it is a task beyond the routine examination of land records that was involved in *Mennonite*". *Id.* 765 F.2d at 11. The court held that the names of the distributees of the probate estate were not reasonably ascertainable for purposes of applying *Mennonite*. *Id.* 765 F.2d at 12.

It is important to note that *Bender* contained facts that were nearly identical to those underlying Petitioners' claims. Although *Bender* was not appealed to this Court, the Second Circuit's decision was based upon the premier due process cases of *Mullane* and *Mennonite*. *Bender* affirms that Petitioners' assumption that their interests were reasonably ascertainable is without any basis in fact or law.

Tenn. Code Ann. §67-2018 is constitutional where it provides that those whose names are not reasonably ascertainable and who desire actual notice must comply with the registration requirements of the statute. This statute provides that the notice of a tax sale shall be sent to the last known address of the present owner and that it is the responsibility of the property owner to register his/her name and address with the tax assessor. Petitioners claim that this statutory provision denies them due process because it conditions their constitutional right to notice on registering their names with the tax assessor. Other federal cases dealing with this issue have held that where the names of property owners are not reasonably ascertainable actual notice may be conditioned upon a similar registration requirement.

Lehr v. Robertson, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983); *Davis Oil Company v. Mills*, 873 F.2d 774 (5th Cir. 1989), *cert. denied*, ____ U.S. ____, 110 S.Ct. 331, 107 L.Ed.2d 321 (1989). *Davis Oil Company* supports Respondents' contention that actual notice was not required to be given to Petitioners. In *Davis Oil*, the Fifth Circuit Court held that constructive notice to a junior mineral lessee, whose lease would be extinguished under Louisiana law by a foreclosing mortgagee, was sufficient. *Id.* 873 F.2d at 791. The court reasoned that the junior lessee had failed to avail himself of Louisiana's request notice statute and searching of conveyance records to identify parties with mineral interests would have been unduly burdensome. *Id.* 873 F.2d at 789. Likewise, actual notice was not required to be given to Petitioners and constructive notice was sufficient as Petitioners had failed to register their names and addresses with the tax assessor and searching probate records would have been unduly burdensome.

The pertinent statute at issue in *Davis Oil* contained a request notice provision which set forth that any person may obtain notice by mail of the seizure of property by paying a specific fee and placing his name and address on file in the mortgage records of the parish where the property was located. The Fifth Circuit Court stated that "in the instant case, we evaluate the burden of requiring a seizing creditor to wind its way through a potentially complex maze of leases and assignments in order to identify interested parties, together with the relatively simple means available, under RS: 13:3886, to ensure receipt of notice. We conclude that under the circumstances 'reasonable diligence' did not require that FNB search the conveyance records to ascertain the identities of mineral leases". *Id.* 873 F.2d at 790.

It is evident that the court in *Davis Oil* balanced the effort required by the state to ascertain the lessee's interest against the effort necessary for the lessee to request notice. The statute was not violative of due process where compliance with its re-

quirements was "simple" and searching conveyance records was "unduly burdensome". Constructive notice was deemed to be adequate in this instance and the statute was upheld. Respondents do not contend that Tenn. Code Ann. §67-2018 serves as the sole determinant of those property owners entitled to notice, but that registration is necessary for those property owners desiring actual notice whose names are not reasonably ascertainable.

A request notice statute such as Tenn. Code Ann. §67-2018 is constitutional where it provides that those whose names are not reasonably ascertainable and who desire actual notice must comply with the registration requirements of the statute. Petitioners' interests were not reasonably ascertainable by Respondents Jim Ed Clary and Bill Garrett without an extensive and impracticable search. Therefore, in the instant case, since Petitioners did not comply with Tenn. Code Ann. §67-2018, they were not entitled to actual notice but only constructive notice in the name of Mr. Edney as this was the best possible notice under the circumstances. The foregoing analysis indicates that the decisions of the Tennessee courts at issue do not conflict with prior decisions of this Court and that these decisions are entirely consistent with *Mullane*, *Mennonite*, and other decisions of this Court which have thoroughly resolved the issue at hand. Therefore, there is no basis for review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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(4)

No. 90-222

In The

Supreme Court of the United States

October Term, 1990

BEVERLY ANN COOK, CLAUD RICHARD DOTY, WENDELL L. SMITH, JR., and LINDA SMITH WEST,

Petitioners,

vs.

ARAMINTA McCULLOUGH; C & N LEASING AND RENTAL CO., INC.; JIM ED CLARY, PROPERTY ASSESSOR OF THE METROPOLITAN GOVERNMENT; BILL GARRETT, TRUSTEE OF DAVIDSON COUNTY; and MULTIMEDIA, INC. d/b/a THE NASHVILLE RECORD,

Respondents.

On Petition For A Writ Of Certiorari To The Tennessee Court Of Appeals

AMICUS BRIEF OF THE STATE OF TENNESSEE IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the petitioners' constitutional challenge to the validity of Tenn. Code Ann. § 67-2018 [1976 Replacement] was adequately presented to the state courts and is therefore properly reviewable by this Court.

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AMICUS BRIEF OF THE STATE OF TENNESSEE IN OPPOSITION TO PETITION FOR CERTIORARI

The State of Tennessee, through Charles W. Burson, Attorney General, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the Tennessee Court of Appeals dated

December 29, 1989. That opinion is found in Appendix C to the Petition (Pet. App., A-7).

STATEMENT OF FACTS

The State of Tennessee as amicus curiae adopts the Statement of Facts contained in the Brief of Respondent Multimedia, Inc. d/b/a *The Nashville Record*.

SUMMARY STATEMENT OF AMICUS CURIAE'S POSITION

The position of the State of Tennessee as amicus curiae is that the petitioners failed to raise the constitutional issue in the state courts and are therefore precluded from raising it in this Court. This failure means that a sufficient record was not developed to allow this Court to rule on the constitutional issue.

The requirement of Tenn. Code Ann. § 67-2018 [1976 Replacement] that a property owner register his name and address with the county tax assessor in order to receive actual notice of the sale of the property for delinquent taxes does not on its face violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

It is well settled that this Court will not review a final judgment of a state court unless the record clearly shows

that the federal claim was adequately presented to the state courts. *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537 (1987). In the instant case the record indicates that the petitioners' constitutional claim was not presented to the state court.

It is the general rule in Tennessee that questions not raised in the trial court will not be entertained on appeal. This rule applies to a constitutional attack upon a statute unless the statute is obviously unconstitutional on its face. *Lawrence v. Stanford,* 655 S.W.2d 927 (1983). In the instant case the Tennessee courts properly did not consider the statute attacked by the petitioners to be unconstitutional on its face.

It is the statutory duty of the Tennessee Attorney General to defend the constitutionality of statutes enacted by the General Assembly. Tenn. Code Ann. § 8-6-109(b)(9). Tennessee Rule of Civil Procedure 24.04 requires that when the validity of a statute is drawn in question, notice must be given to the Attorney General, specifying the pertinent statute.

When notice is properly given, the Attorney General then must decide whether in his opinion the statute is unconstitutional, "in which event he shall so certify to the speaker of each house of the general assembly." Tenn. Code Ann. § 8-6-109(b) (9). In the instant case such notice was not given; therefore, the case was tried and appealed without the knowledge or participation of the Attorney General.[1]

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[1] Upon the remand from the Tennessee Supreme Court to the trial court, the petitioners attempted to amend their

(Continued on following page)

As a result of the petitioners' failure timely to raise the constitutional issue and to notify the Attorney General, the record was not complied with this issue in mind. It is therefore impossible in the present state of the record to determine, for example, the extent of the burden that would have been placed upon the respondent county officials to ascertain the names of the petitioners from the public records. The State of Tennessee submits that this would be crucial in deciding the constitutional issue.

The State of Tennessee submits that this Court should not decide the constitutionality of a state statute before the state courts have had the opportunity to pass on it. The record should be developed on the constitutional issue with the Attorney General's participation before any court decides it. Otherwise, the decision would be made in a factual vacuum. In the instant case, the absence of a factual record compiled with the constitutional issue in mind is particularly crucial. The case of *Bender v. City of Rochester*, 765 F. 2d 7 (2d Cir. 1985), illustrates this. There, the question was also whether the local government was required to notify certain owners of real property that tax foreclosure proceedings had been instituted against their property. The property owners in question were distributees of a decedent's property. The court held that their names were not reasonably ascertainable under *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983),

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complaint to allege the unconstitutionality of the statute and to give notice to the Attorney General, but the motion to amend was properly denied by the Chancellor as being beyond the scope of the remand. (Pet. App., at A-58)

because a routine examination of land records would not necessarily have revealed their identities.

The very same considerations apply in the instant case since the petitioners are distributees of the estate of the record owner of the property in question. As in *Bender,* it is not unreasonable to require that the executor of the estate or the beneficiaries notify the tax assessor of their claims.

Also illustrative of this point is *Lehr v. Robertson,* 463 U.S. 248 (1983), in which the putative father was held not entitled to notice of adoption proceedings when he had failed to register with the state's Putative Father Registry in accordance with statute. This Court noted that the right to receive notice was completely within the putative father's control. The Court stated: "The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights." *Id.* at 265. The failure of the instant petitioners properly to raise their due process claims precluded the development of the facts with respect to the interest involved.

The State of Tennessee also relies upon *Davis Oil Co. v. Mills,* 873 F.2d 774 (5th Cir. 1989), wherein the court upheld a statute similar in effect to Tenn. Code Ann. § 67-2018 and stated:

> The act of requesting notice under the statute does not . . . impose a burden of constant vigilance on the property owner. Rather, it allows one whose identity as an interest holder may not otherwise be readily ascertainable to protect his or her interest in the subject property through a single, simple act. We therefore do not

> believe that our limited reliance on RS13:3886 runs afoul of *Mennonite*.

Id. at 791 (footnote omitted). The court further stated:

> [T]he reasonableness of constructive notice in a particular case may turn on the nature of the property interest at stake and the relative ease or difficulty of identifying such interest holders from the land records and also on the existence of alternative means of insuring the receipt of notice.

Id. Here, the record has not been developed, and it is therefore impossible to determine the relative ease or difficulty of identifying the petitioners from the land records.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for a Writ of Certiorari to the Tennessee Court of Appeals.

Respectfully submitted,

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